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Bard N. Holbrook v. Master Protection Corporation, dba Firemaster, a California corporation; Robin D. Phillips; John Does 1-20 : Brief of Appellant

Utah Court of Appeals

Richard N. Bigelow; Attorney for Appellee.
John T. Anderson; Parsons, Behle & Latimer; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

BARD N. HOLBROOK, Plaintiff-Appellee-Cross-Appellant, vs. MASTER PROTECTION CORPORATION, dba FIREMASTER, a California corporation; ROBIN D. PHILLIPS; and JOHN DOES 1-20, Defendant-Appellant-Cross-Appellee.	BRIEF OF APPELLANT Appeal No. 920216-CA (Oral Argument Priority No. 16)

Appeal from a Final Judgment
of the Third Judicial District Court
of Salt Lake County, Utah.
The Honorable Pat B. Brian

JOHN T. ANDERSON (0094)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Appellant and
Cross-Appellee
201 South Main Street
Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

RICHARD N. BIGELOW
900 First Interstate Bldg.
170 South Main Street
Salt Lake City, Utah 84111
Telephone: (801) 575-5000
Attorney for Appellee and
Cross-Appellant

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RICHARD N. BIGELOW
900 First Interstate Bldg.
170 South Main Street
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Telephone: (801) 575-5000
Attorney for Appellee and
Cross-Appellant

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JOHN T. ANDERSON (0094)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Appellant and
Cross-Appellee
201 South Main Street, Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

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* * * * * * * *

I.

JURISDICTION

The authority believed to confer jurisdiction on the Supreme Court of the State of Utah to hear this appeal from the Third Judicial District Court of Salt Lake County is Article VIII, Section 4 of the Utah Constitution; Utah Code Ann., § 78-2-2(3)(j) (1988); and Rule 3(a), Utah Rules of Appellate

Procedure. The Supreme Court, acting pursuant to Rule 42, Utah Rules of Appellate Procedure, transferred this appeal to this Court by order dated April 3, 1992.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this case:

1. Did the trial court abuse its discretion in denying the motion of appellant, Master Protection Corporation dba FireMaster ("Franchisor") to continue the trial of the case where appellee, Bard N. Holbrook ("Franchisee") failed to timely or fully provide extensive requested documents and information vital to the Franchisor's defenses?

This issue is a mixed question of fact and law. The nature and extent of the Franchisor's efforts to acquire the requested documents and information and the circumstances under which the Franchisor moved for a continuance of the trial date are reviewable under a clearly erroneous standard. Utah R.Civ.P. 52(a); State v. Humphreys, 707 P.2d 109 (Utah 1985). Whether the trial court abused its discretion in refusing to continue the trial date is a question of law reviewed for correctness. Griffiths v. Hammon, 560 P.2d 1375, 1376 (Utah 1977).

2. Did the trial court err in refusing to grant the Franchisor a new trial where the jury issued irreconcilably inconsistent findings regarding the enforceability of the written agreements in effect between the Franchisor and the Franchisee? This issue is a question of law reviewed for correctness. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989).

3. Given the absence of any evidence respecting the nature or extent of, or responsibility for, damages to the Franchisee beyond those for unpaid sales commissions, did the trial court err in refusing to grant the Franchisor's motion for a remittitur of the jury's award of $50,000 on the Franchisee's claim for breach of the implied covenant of good faith and fair dealing?

This issue is a mixed question of fact and law. The factual composition of the disputed damages is reviewable under a clearly erroneous standard. Utah R.Civ.P. 52(a); Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). The propriety of the trial court's refusal to compel a remittitur of the disputed damages is a question of law reviewed for correctness. Marchant, 771 P.2d at 677.

4. Did the trial court err in refusing to award attorneys' fees to the Franchisor as the "prevailing party" on the parties' respective breach of contract claims? This is a

question of law reviewed for correctness. Marchant, 771 P.2d at 677.

5. Did the trial court err in refusing to enter judgment against the Franchisee for any portion of three promissory notes that he signed to purchase his franchises?

This issue is a mixed question of fact and law. The extent to which the Franchisee is indebted to the Franchisor under the notes is a factual issue reviewable under a clearly erroneous standard. Utah R.Civ.P. 52(a); Matter of Estate of Bartell, 776 P.2d at 886. Whether the Franchisee is excused from performing his obligations under the notes is a question of law reviewed for correctness. Marchant, 771 P.2d at 677.

6. Did the trial court err in overruling the Franchisor's objection to the statement of the Franchisee's counsel in closing argument that he was ". . . just certain that none of you [jurors] would choose to be placed in that kind of a circumstance [of being obligated under promissory notes], and, were you, that you would feel as though you had been forced into the decision to go into debt"? This is a question of law reviewed for correctness. Marchant, 771 P.2d at 677.

7. Did the trial court err in deciding to terminate a preliminary injunction that it previously entered against the Franchisee--an injunction that enjoined the Franchisee from

exploiting the Franchisor's confidential customer information--where the jury specifically determined that the customer information was indeed confidential and protectable? This is a question of law reviewed for correctness. Marchant, 771 P.2d at 677.

III.

DETERMINATIVE STATUTES, ORDINANCES OR RULES

There are no constitutional provisions, statutes, ordinances or rules whose interpretation is believed to be solely determinative of the outcome of this case.

IV.

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition in District Court.

The Franchisee instituted this action primarily to recover unpaid sales commissions allegedly earned under a series of territory and franchise agreements (collectively, the "Franchise Agreements") with the Franchisor (R. 2-183). The Franchisor counterclaimed to (i) recover liquidated damages under the Franchise Agreements, (ii) collect three promissory notes (collectively, the "Notes") in the aggregate principal amount of $115,000 that the Franchisee executed in connection with his purchase of the franchise territories, and (iii) obtain injunctive relief arising from the Franchisee's unlawful post-termination

use of the Franchisor's confidential customer information (R. 225). The trial court immediately entered a preliminary injunction (the "Injunction") against the Franchisee enjoining him from exploiting the confidential information (R. 740-99).

At trial ten months later, the jury issued a long series of special verdicts which, among other things, awarded the Franchisee compensatory damages of approximately $85,000[1] and punitive damages of approximately $5,000 (R. 3151-94). In doing so, the jury specifically determined that the Franchise Agreements were not enforceable (R. 3181-82). However, in awarding the Franchisor damages of more than $15,000 on its counterclaim for the Franchisee's improper use of the confidential information and conversion of the Franchisor's parts inventory, the jury specifically determined that the Franchise Agreements were in fact enforceable (R. 3192-94).

In entering judgments based on the jury's verdicts, R. 3882-91, the trial court rejected the Franchisor's claim that the contradictory verdicts were irreconcilably inconsistent and that there was no factual or legal basis for the jury's award of

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1 The precise composition of these damages is $5,891.35 for breach of the Franchise Agreements, $30,032.71 for conversion of the Franchisee's earned sales commissions, $50,000 for breach of the implied covenant of good faith and fair dealing, and $1.00 for breach of fiduciary duty.

damages on the Franchisee's claims for breach of the implied covenant of good faith and fair dealing. The trial court further determined that even though the Franchisor received almost twice the damages awarded to the Franchisee on their respective breach of contract claims, neither party was the "prevailing party" for the purpose of recovering attorneys' fees (R. 3884).

After a series of post-trial motions, the trial court refused to enter judgment against the Franchisee for any portion of the $115,000 indebtedness he owed to the Franchisor under the Notes (R. 3891).[2] The trial court further refused to make permanent the Injunction that it had previously issued against the Franchisee. (R. 3540).[3] The trial court did so despite the fact

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[2] The parties previously stipulated to have this issue resolved by the trial court after trial. (Tr. at R. 5438-39). The stipulation provided that the Franchisor had established a prima facie case for the imposition of liability on the Notes in a sum equal to their face amount ($115,000) less all proven payments ($11,826), provided, however, that to the extent the jury determined that the Franchisee was legally excused from performance under the Franchise Agreements, the trial court was entitled to take that finding into account in fixing the Franchisee's ultimate liability on the Notes (Tr. at R. 4521, 4583-84, 5438-39).

[3] The trial court, oddly enough, conditioned (or at least coupled) the termination of the Injunction on the Franchisee's payment of the sum of $11,014. (R. 3728). The court never explained the rationale, if any, for the amount of this payment; it also never explained how the payment was supposed to serve as a reasonable substitute for a judgment on the Notes or for a

Footnote continued on next page.

that the jury specifically determined that the confidential information for which the preliminary injunction was issued was protectable. (R. 3192-94).

Final judgments were entered on the Franchisee's complaint and the Franchisor's counterclaim on October 3, 1991. (R. 3882-91). The trial court denied the Franchisor's motion for new trial by order dated January 3, 1992 (R. 4253-54). The Franchisor filed its notice of appeal on January 27, 1992. (R. 4255). The Franchisee filed its notice of cross-appeal on February 4, 1992. (R. 4262).

B. Statement of Facts.

The Franchisor is engaged in the business of selling commercial and industrial fire prevention and suppression service franchises under the registered trademark "FireMaster." (Trial Exhibit P-2 at 1, 2 and 6). In 1987 and 1988, the Franchisee purchased one FireMaster territory and two FireMaster franchises pursuant to the Franchise Agreements. (Trial Exhibits P-1, P-2

Footnote continued from previous page.

continuation of the Injunction. It simply concluded that the payment was "equitab[ly]" required. Id.

and P-3).[4] His purchase obligation was evidenced by three Notes in the aggregate principal amount of $115,000. (Trial Exhibit "F").[5] Because the Franchisor had spent about $240,000 to acquire and develop an extensive customer list in the franchise territories, Tr. at R. 4635, 4644, 5698, the Franchise Agreements required the Franchisee to keep strictly confidential all information concerning the identity and specific service requirements of the Franchisor's customers. (Franchise Agreements, ¶ 14). This confidentiality protection was fortified by a trade secret agreement (the "Trade Secret Agreement") that the Franchisee signed. (Trial Exhibit "V").[6]

The Franchise Agreements required the Franchisor to pay the Franchisee certain defined percentages of the gross profits that the Franchisee generated in his franchise territories.

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[4] An accurate copy of one of the Franchise Agreements (all of which are substantively identical) is reproduced at Tab "A" to the Franchisor's Appendix, infra.

[5] An accurate copy of each of the Notes is reproduced at Tab "B" to the Franchisor's Appendix, infra.

[6] An accurate copy of the Trade Secret Agreement is reproduced at Tab "C" to the Franchisor's Appendix, infra.

(Franchise Agreements, ¶ 8(e)).[7] During his 31-month tenure as an affiliate of the Franchisor, the Franchisee received from the Franchisor total gross compensation of $414,266.00. (Tr. at R. 4521; Trial Exhibit P-11). In 1989 the Franchisee became disenchanted with the manner in which the Franchisor was calculating and paying earned commissions. (Tr. at R. 5667). This unhappiness led to the Franchisee's decision to terminate as a FireMaster franchisee in January 1990. (Tr. at R. 5734).

The Franchisee immediately filed a complaint against the Franchisor to recover allegedly earned but unpaid sales commissions and additional damages under several claims for relief, including breach of the implied covenant of good faith and fair dealing, conversion and breach of fiduciary duty. (R. 2-183).

To quantify his commission claims, the Franchisee retained a certified public accountant, Arthur J. Miller (Tr. at R. 4779). In early September 1990, the Franchisor served the Franchisee with discovery requests that, among other things, asked the Franchisee to identify and produce "[a]ll documents on which [the Franchisee] relies in support of his allegation that [the Franchisor] underpaid and/or improperly paid [the

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[7] The Franchise Agreements also entitled Franchisee to receive additional compensation in the form of enhanced commissions for new accounts and a travel allowance for work performed in his rural Utah franchise territory. (Franchise Agreements, ¶ 4(d)).

Franchisee]" and "[a]ll documents that [the Franchisee] intends to introduce into evidence at the trial of this matter." (R. 1607-08). One such document was Mr. Miller's accounting report (the "Miller Report") (Trial Exhibit P-32). As early as June 1990, the Franchisee's legal counsel promised to produce the Miller Report in the near future (R. 2623-24). By November 1990, he promised on successive occasions to do so by various specified dates including "next month," "when the accountant is reasonably able to get to it," "next week," and "I'm really not sure." Id. Based on the Franchisee's failure to timely produce the Miller Report, the trial court granted the Franchisor's first motion to continue the trial date, but, over the Franchisor's objections, limited the continuance to only twenty days. (R. 2615, 2627).

The Franchisee did not produce the Miller Report until January 7, 1991--27 days before the new trial date. (R. 2685). Because the Miller Report made numerous references to underlying work papers (the "Miller Work Papers")--none of which had been previously identified or produced--the Franchisor immediately obtained an order requiring the Franchisee to produce and permit the inspection and copying of all of the Miller Work Papers. Id. Two days later, on January 16, 1991, the Franchisee produced a portion of the ordered Miller Work Papers. Id. Significantly, the Miller Work Papers disclosed for the first time the existence

of hundreds of additional work papers that had been generated by the Franchisee himself (the "Franchisee Work Papers") to assist Miller in preparing the Miller Report.[8] Id. Despite these unexpected references to the Franchisee Work Papers, the Franchisee did not produce them when he produced the initial 40 or 50 pages of the Miller Work Papers. (R. 2685-87). In response to the Franchisor's repeated demands, the Franchisee's legal counsel finally produced on January 23, 1991 what he represented was a complete set of the Franchisee Work Papers--approximately 600 pages. (R. 2686-87). However, the Franchisee Work Papers were incomplete; the Franchisee accordingly produced an additional 200 to 300 pages on January 24, 1991--eleven days before trial. Id.

Alarmed by the Franchisee's failure to timely produce the required documents, the Franchisor filed a second motion to continue (the "Second Motion to Continue") the trial. (R. 2677-83). The Second Motion to Continue was supported by two detailed affidavits of the Franchisor's counsel (collectively, the "Franchisor's Affidavits"). (R. 2684-89, 2701). The

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[8] Miller testified at trial that he received the Franchisee Work Papers by late November 1990 (Tr. at R. 5597). The Franchisee, however, never disclosed the existence of the Franchisee Work Papers in response to the Franchisor's discovery requests. (Tr. at R. 5241). It appears, therefore, that the Franchisee concealed both the existence and substance of the Franchisee Work Papers for more than 45 days. He waited until eleven days before the new trial date to produce them (R. 2687).

Franchisor's Affidavits itemized the extensive efforts that the Franchisor's counsel had undertaken to obtain the Miller Report, the Miller Work Papers and the Franchisee Work Papers. (R. 2701-03). The Franchisor's Affidavits established that as of the morning trial was scheduled to begin, the Franchisee had still failed to produce some of the Franchisee Work Papers. Id. The Franchisor accordingly urged the court to continue the trial date. (Tr. at R. 4269-86). Even though the Franchisee failed to rebut the Franchisor's Affidavits, see Tr. at R. 4277-82[9], the court refused to grant the requested continuance. (R. 2711).

At trial, the Franchisor objected to the court's receipt in evidence of the Franchisee Work Papers. (Tr. at R. 5229-36). The trial court overruled that objection, Tr. at R. 5237, but allowed the Franchisor's counsel to defer for three days (including an intervening weekend) his cross examination of the Franchisee's accounting expert, Miller (Tr. at 5237-38). Given the Franchisor's concerns about the prejudicial effect of any lengthy delay if the trial was suspended for anything more than a brief period, and based upon the trial court's previous

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9 The Franchisee's counsel did not contest the chronology of events detailed in the Franchisor's Affidavits. Rather, he simply complained to the court that the Franchisor had itself withheld requested documents. (Tr. at R. 4278-80). The Franchisee, however, never sought the court's assistance on this issue before trial.

decision not to grant the Second Motion to Continue, the Franchisor acceded to the trial court's assertion that a three-day continuance be granted. (Tr. at R. 5243-44). Based on the Miller Report, the Miller Work Papers and the Franchisee Work Papers (which claimed an entitlement to $37,513.98 of unpaid commissions), the jury awarded the Franchisee damages of $35,926.06 for commissions on his breach of contract and conversion claims.

The jury also awarded the Franchisee damages of $50,000 for his claim for breach of the implied covenant of good faith and fair dealing (R. 3183-84). Although the jury's special verdict is silent on the issue, it appears that the damages were intended to compensate the Franchisee for a portion of the $158,206 in administrative and related fees that the Franchisee had paid to the Franchisor. (Tr. at R. 4521; Trial Exhibit P-11). These damages apparently were based on paragraph 8 of the Franchise Agreements which required the Franchisor to provide certain defined benefits and services (collectively, the "Paragraph 8 Services") including (i) detailed customer lists, (ii) equipment, inventory and service documenting, (iii) telephone answering and mail handling, (iv) general administrative, accounting, billing and collection assistance, and (v) sales assistance and advertising. (Franchise Agreements, ¶¶ 8(a)-(d)). The Franchisee claimed a loss of $158,206 from his

supposed failure to receive the Paragraph 8 Services.[10] (Tr. 258; Trial Exhibits P-11 and P-32). However, he adduced no evidence of the nature and extent to which he had failed to receive the Paragraph 8 Services.

The record is uncontroverted that the Franchisee received extensive help from the Franchisor in the completion of his sales summaries (Tr. R. 4540-42, 4596, 5601, 5607); that the Franchisee received extensive customer account information (Tr. at R. 4593, 5727-30); that the Franchisee received parts lists (Tr. at R. 4760); that the Franchisee received the best available parts prices (Tr. at R. 4605);[11] that the Franchisee received the

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10 As demonstrated at pp. 35 and 36 infra, the jury's combined verdicts on the Franchisee's breach of contract claims state that the "total amount of all damage suffered by [the Franchisee] as a result of the Franchisor's breach[es]" of the Franchise Agreements was $5,891.35 (R. 3151-59). (Emphasis added). Because the Franchisee properly couched his claim for damages under Paragraph 8 in terms of breach of a specific contractual obligation (i.e., the obligation imposed by paragraph 8 of the Franchise Agreements to provide the Paragraph 8 Services), the Franchisee's claim for breach of the implied covenant of good faith and fair dealing cannot be used to augment the recovery received on the breach of contract claims. In other words, once the jury concluded that total damages on the breach of contract claims were to be fixed at $5,891.35, there was no basis for recasting and enhancing recovery of the Paragraph 8 Services in the form of the implied covenant of good faith and fair dealing.

11 The Franchisee did adduce evidence that the Franchisor, like any other distributor, marked-up the price of its parts over cost before selling them to the Franchisor (Tr. at R. 4721). The

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benefit of the Franchisor's telephone service numbers (Tr. at R. 4764); that the Franchisee derived value from his use of the Franchisor's trade name (Tr. at R. 4626, 5725); that the Franchisee received extensive accounting services (Tr. at R. 4692, 5608-09);[12] that the Franchisee received valuable insurance coverage (Tr. at R. 5725); that the Franchisee received significant advertising benefits (Tr. at R. 4747-52); and that the Franchisee, in general, received the benefit of his bargain under paragraph 8(a)-(d) of the Franchise Agreements. (Tr. at R. 4714-15; 5378-79).

Footnote continued from previous page.

Franchisee adduced no evidence quantifying the extent of such mark-ups and the extent, if any, to which he suffered legally cognizable damage from such mark-ups. (See e.g. Trial Ex. P-32 at 2).

12 The Franchisee did establish that the Franchisor's accounting system failed to properly track transactions on which "second inspection commissions" were to be paid. (Tr. at R. 4775). It was uncontroverted, however, that such transactions occurred only rarely and would have been an administrative "nightmare" to track. (Tr. at R. 4745, 5617).

Moreover, the Franchisor readily acknowledges that because the jury awarded the Franchisee damages of over $35,000 for earned but unpaid sales commissions, the Franchisee was arguably entitled to recover from the Franchisor as an item of damage all fees and costs he incurred to have his accountant quantify his commission claims. However, the Franchisee adduced no evidence at trial of what amount, if any, he paid his accountant for those services.

Finally, the jury issued a series of special verdicts. (R. 3151-94). Four of those verdicts reflect the jury's determination that the Franchisor's conduct had the effect of terminating the Franchisee's obligations under the parties' contracts. (R. 3181-82).[13] These findings are embodied in paragraphs 14-17 of the Franchisee's Judgment. (R. 3890). Paragraph 14 explicitly states that the Franchisor's conduct prevents it ". . . from being able to enforce the non-competition and liquidated damages provisions of the contracts between the parties." Id. However, this finding is contradicted by the jury's determination that the Franchisee breached the confidentiality provisions of the Franchise Agreements and that the Franchisee is liable for liquidated damages of $10,000 under the Franchise Agreements. (R. 3192-94).[14] Without explaining why, the trial court stated that these contradictory findings were ". . . reconcilable in the overall context of this case." (Tr. at R. 5821).

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13 An accurate copy of these verdicts is reproduced at Tab "D" to the Franchisor's Appendix, infra.

14 An accurate copy of this verdict is reproduced at Tab "E" to the Franchisor's Appendix, infra.

V.

SUMMARY OF ARGUMENTS

1. The Franchisee unfairly and prejudicially concealed from the Franchisor numerous accounting documents quantifying his claim for unpaid sales commissions. Because the accounting documents were produced only a few days before trial, the Franchisor had no meaningful opportunity to examine, analyze and rebut their premises and conclusions. The trial court's refusal to continue trial of the case under these circumstances constitutes an abuse of discretion. This Court should vacate the jury's award of damages for unpaid commissions of $35,926.06 and remand this issue for a new trial.

2. As part of its extensive special verdicts in this case, the jury determined that the Franchisor was not entitled to enforce any provisions of the parties' contracts. The jury, however, also specifically determined that the confidentiality provisions of the parties' Franchise Agreements were in fact enforceable and that the Franchisor was entitled to $10,000 in liquidated damages as a result of the Franchisee's breach. As such, the verdicts purport to simultaneously invalidate and enforce the parties' contracts -- an irreconcilably inconsistent and logically impossible outcome. Under Utah law, the trial court should have either granted a new trial or simply vacated

the special verdicts that favored the Franchisee -- verdicts that were far more general in scope than the specific, narrowly-drawn verdict that favored the Franchisor. The trial court's refusal to adopt either of these alternative approaches is reversible error.

3. The record is devoid of any evidentiary support for the trial court's entry of judgment for $50,000 on the Franchisee's claim for breach of the implied covenant of good faith and fair dealing. To be sustained on appeal, this damage award must be established by substantial, non-speculative evidence that creates a reasonable probability that the Franchisee suffered damage in a definable amount. The Franchisee not only failed to establish the fact of damage, it also failed to establish the amount of such damage. Moreover, these damages were awarded to compensate the Franchisee for his supposed failure to receive the Paragraph 8 Services for which he bargained under paragraph 8 of the Franchise Agreements. Because the obligation to perform the Paragraph 8 Services arose under an express provision of the Franchise Agreements, any breach of that obligation could be recompensed only through the Franchisee's breach of contract claim, and not through his claim for breach of the implied covenant of good faith and fair dealing. This award, therefore, must be vacated in its entirety.

4. Given the composition and amount of damages awarded to the parties on their respective breach of contract claims -- $10,000 to the Franchisor and $5,891.35 to the Franchisee -- the Franchisor emerged as the party with the net judgment in its favor. Under applicable law, the Franchisor is the prevailing party entitled to recover its attorneys' fees incurred for its prosecution and defense of the breach of contract claims. The trial court erred as a matter of law in determining that under the facts and circumstances of this case, neither party had prevailed in the action.

5. The trial court erred in refusing to enter judgment against the Franchisee for any portion of the indebtedness he owed to the Franchisor under the three Notes that he signed in connection with his purchase of the Firemaster franchises. The trial court's apparent view that the Franchisee was legally excused from paying the Notes is unsupported by any evidence in the record or by any of the jury's special verdicts. The effect of the court's decision is to confer an unconscionable windfall upon the Franchisee by allowing him to simultaneously recover damages for loss of the benefit of his bargain under the Franchise Agreements and rescind the Notes that were executed in connection with the Franchise Agreements. This Court should either enter judgment on the Notes in favor of the Franchisor as a

matter of law or remand this issue to the trial court with instructions to explain its rationale for initially refusing to do so.

6. During his closing argument at trial, the Franchisee's legal counsel urged the jury to place itself in the position of the Franchisee to determine whether it was fair for the Franchisee to be forced into debt under the Notes. Counsel's comment constitutes a clear violation of the well-settled principle of trial advocacy that prohibits a party from invoking the "Golden Rule" technique of argument. The trial court erred in overruling the Franchisor's timely and specific objection to this argument. The argument prejudicially affected the Franchisor's rights by leading to a special verdict finding that the Franchisee was released from any liability under the parties' contracts -- a finding that the trial court specifically endorsed and relied upon in making its decision not to enforce the Notes. The Franchisor is entitled to a new trial to purge the taint of this improper tactic.

7. Shortly after this action was instituted, the trial court entered a preliminary injunction against the Franchisee enjoining him from exploiting the Franchisor's confidential customer information. At trial, the jury expressly determined that this information was indeed confidential and that the

Franchisee's breach of the confidentiality provisions of the parties' Franchise Agreements caused damages of $10,000 to the Franchisor. The trial court's inexplicable refusal to make permanent the preliminary injunction in the face of the jury's special verdict is reversible error.

VI.

ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONTINUE TRIAL OF THE CASE IN THE FACE OF THE FRANCHISEE'S PREJUDICIAL FAILURE TO TIMELY PROVIDE INFORMATION VITAL TO THE FRANCHISOR'S DEFENSES.

Trial courts admittedly have considerable discretion in deciding whether to grant continuances. Utah R.Civ.P. 40(b); State v. Humphreys, 707 P.2d 109 (Utah 1985). However, to the extent the trial court abuses its discretion in refusing to grant a continuance, a new trial may be ordered to ameliorate any prejudice flowing from that refusal. Griffiths v. Hammon, 560 P.2d 1375, 1376 (Utah 1977) (where counsel has made timely objections, given necessary notice, and has made reasonable efforts to have a trial date changed for good cause, it is generally an abuse of discretion not to grant a continuance); Bairas v. Johnson, 373 P.2d 375, 377-78 (Utah 1962) (trial court's refusal to grant an additional five-week continuance, even where it had previously granted a three-month continuance, was an abuse of discretion). One of the relevant factors to determining whether a continuance

should be granted is the presence or absence of bad faith on the part of the party's counsel resisting the continuance. Christenson v. Jewkes, 761 P.2d 1375, 1377, n.2 (Utah 1988). In the final analysis, where the trial court acts "unreasonably" in denying a continuance, its decision constitutes reversible error. Hardy v. Hardy, 776 P.2d 917, 925-26 (Utah App. 1989).

It cannot be disputed in this case that the Franchisor timely requested the production of all documents on which the Franchisee based his claim for earned but unpaid sales commissions. It formally requested those documents in September 1990. (R. 1607-08). Yet the Miller Report was not produced until 27 days before trial, and only then after the Franchisee's counsel made and broke numerous promises that the Report would be produced earlier and after the court formally compelled its production (R. 2623-24, 2685). The Miller Work Papers trickled in beginning 18 days before trial. (R. 2685). They contained hundreds of references to the Franchisee Work Papers--papers that Miller received three months before trial, see Tr. at R. 5597, but which were withheld from the Franchisor until eleven days before trial. (R. 2686-87). In retrospect, there can be no real dispute that the Franchisee's counsel repeatedly misrepresented the existence, nature and extent of these documents. The Franchisee, therefore, acted in less than good faith in producing the

documents crucial to establishing and quantifying his claim for unpaid commissions.[15]

Even after trial was continued for 20 days, however, the Franchisee still failed to produce the required documents. (R. 2701-03). Because, it was not until two days before trial that the Franchisor finally received most (but not all) of the requested documents, the Franchisor was precluded from reviewing, organizing and analyzing the requested documents. Unsympathetic to the Franchisor's plight, the trial court refused to grant even a brief continuance. (R. 2711).

The importance to the jury of the Miller Report, the Miller Work Papers and the Franchisee Work Papers became obvious at trial. Those documents were the sole quantitative basis on which the jury concluded that the Franchisor had underpaid commissions to the Franchisee. Without those documents, there was no factual or legal basis for the jury's award of $35,926.06 for unpaid commissions. This is the epitome of prejudice. If the Franchisor had been given the requested documents far enough in advance of trial--or if the trial court had continued the trial to facilitate that production--the Franchisor would have been

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15 The absence of good faith by the non-moving party is a decisive factor influencing a trial court's decision to continue trial of a case. Christenson, 761 P.2d at 1377, n.2.

able to adequately prepare for and present its defenses to the quantified commissions in the Miller Report, the Miller Work Papers and the Franchisee Work Papers. Because it did not have that opportunity, the Franchisor had no realistic chance to refute the Franchisee's claims.

The trial court prejudicially abused its discretion by not according the Franchisor a reasonable continuance in which to examine, analyze and meaningfully rebut the Franchisee's accounting documents. The Court should vacate the jury's award of $35,926.06 and remand this issue for a new trial.

B. THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL IN THE FACE OF THE JURY'S HOPELESSLY CONTRADICTORY AND ILLOGICAL VERDICTS.

Utah law is well settled that the trial court has "wide latitude of discretion" under its "general supervisory powers" over jury verdicts to grant a new trial. Haslam v. Paulsen, 389 P.2d 736 (Utah 1964); accord Wellman v. Noble, 366 P.2d 701, 703 (Utah 1961) (the trial court has "broad discretion" in ruling on a motion for new trial). According to the Utah Supreme Court:

> The broad discretionary power of the trial court in the granting or denying of new trials is well established. This is necessarily so to allow the Court an opportunity to cause re-examination or correction of jury verdicts or findings which it believes to be in error or where there is substantial doubt that they were fairly tried.

Page v. Utah Home Fire Insurance Co., 391 P.2d 290, 292-93 (Utah 1964). The law is settled that when the jury's responses to special interrogatories are irreconcilably inconsistent, the usual remedy is to grant a new trial. Blue Chelan, Inc. v. Dep't of Labor and Indus., 681 P.2d 233, 235 (Wash. 1984); Alzado v. Blinder, Robinson & Co., 752 P.2d 544, 557 (Colo. 1988); Navararre v. Ostdiek, 518 P.2d 1362, 1363 (Colo. App. 1973).

In Blue Chelan, 681 P.2d at 233, plaintiff contracted pulmonary disease while working for his employer. He filed a disability claim for worker's compensation. The jury answered special interrogatories concerning plaintiff's disability. In answering the first interrogatory, the jury found that plaintiff was not totally and permanently disabled. However, in answering the second interrogatory, the jury concluded that plaintiff was not capable of obtaining and performing gainful employment on a reasonably continuous basis; the effect of this finding was that plaintiff was in fact totally and permanently disabled. The Court concluded that the jury's answers were irreconcilably inconsistent and ordered a new trial. 681 P.2d at 235. The Court then stated:

> Neither a trial court nor an appellate court may substitute its judgment for that which is within the province of the jury. In light of the irreconcilable inconsistency in the jury's findings, it is impossible to determine whether the jury meant to affirm or reverse the Board's ruling. Thus, the only

> proper recourse is to remand the cause for a new trial. Id.

Alzado, 752 P.2d at 544, is similarly instructive. In that case, the jury returned a verdict for plaintiff on his claim for breach of a written guaranty agreement. However, the jury also returned a verdict for the defendant guarantor on his counterclaim that plaintiff had orally released him from the guaranty. Despite these obvious inconsistencies, the trial court entered judgments based on the special verdicts. The Colorado Court of Appeals reversed the trial court's refusal to grant a new trial, concluding that the jury verdicts were irreconcilable. In affirming that decision, the Colorado Supreme Court stated the seemingly obvious fact that "the record indicates that these jury verdicts are not reconcilable under the claims of the parties and the instructions given to the jury." 752 P.2d at 554. The Court reached this decision despite its recognition of the general principle that "jury verdicts will not be reversed for inconsistency if the record discloses any evidentiary basis to support the verdict." Id. On that basis, the case was remanded back to the trial court for a new trial. Id. at 558.[16]

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16 Navararre, 518 P.2d at 1362 endorses the same principle:

> It is impossible to determine who the jury intended should prevail from the responses it

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Utah law is no different. It recognizes that ". . . a jury's answers to special interrogatories must, if at all possible, be read harmoniously." Moore v. Burton Lumber & Hardware Co., 631 P.2d 865 (Utah 1981). Utah law further recognizes that "when special interrogatories or verdicts are ambiguous, counsel has an obligation either to object to the filing of the verdict or to move that the cause be resubmitted to the jury for clarification." Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078, 1083 (Utah 1985). However, this rule does not apply where, as here, ". . . a verdict is so ambiguous, contradictory or illogical that it does not clearly indicate for whom the verdict is rendered, and the verdict would leave the Court in the position of having no alternative but to guess at what the jury intended." Id.

In this case, the jury's verdicts are so contradictory and illogical that the trial court was indeed placed in the

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> rendered. Furthermore, this court is not permitted to isolate and ignore particular interrogatories, must consider them together, [citation omitted], and where the answers to the interrogatories are inconsistent with respect to the controlling facts in the case, any judgment entered on the special verdict must be set aside and the case remanded for a new trial. [Citation omitted].

position of having to speculate at what the jury intended. On the one hand, the jury determined that the Franchisor was not entitled to enforce any provisions of the parties' contracts. (R. 3181-82; App. "D"). On the other hand, the jury specifically determined that the confidentiality provisions of the parties' contracts were in fact enforceable and that the Franchisor should be awarded $10,000 in liquidated damages. (R. 3192-94; App. "E"). No amount of "clarification" could ever resolve this contradiction. Either the confidentiality provisions are enforceable or they are not. Because the verdicts purport to simultaneously invalidate and enforce the confidentiality provisions, they are hopelessly and illogically irreconcilable.[17]

To resolve the ambiguous and contradictory verdicts, the trial court could and should have done one of two things. First, it could have granted a new trial to both parties. Second, it could have eliminated the inconsistency in the verdicts by simply deleting paragraphs 14-18 of the Franchisee's Judgment, R. 3890 (which purport to release the Franchisee from all his obligations under the parties' contracts) on the basis that they are far more general than the jury's specific finding that the

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17 The trial court implicitly recognized as much when it determined that it was unclear whether either party was the "prevailing party" for purposes of recovering attorneys' fees. (Tr. at R. 4830, 4844).

Franchisor was entitled to enforce and recover liquidated damages for the Franchisee's breach of the confidentiality provisions of the Franchise Agreements. Support for this approach is found in Utah law. Wright v. Westside Nursery, 787 P.2d 508, 516 (Utah App. 1990) ("where the two [contradictory special verdicts] cannot be reconciled, as in this case, the more specific finding must govern the outcome.").

The trial court erred in not adopting either of these alternative approaches. This Court accordingly should remand the case for a new trial of all issues.

C. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR $50,000 ON THE FRANCHISEE'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND IN REFUSING TO REQUIRE A REMITTITUR OF THAT AWARD AS A CONDITION TO NOT GRANTING A NEW TRIAL.

1. The $50,000 Damage Award is not Remotely Supported by the Type of "Substantial Evidence" Required by Utah Law.

Utah has long adhered to the common law position that contract "[d]amages are properly measured by the amount necessary to place the non-breaching party in as good a position as if the contract had been performed." Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982); Keller v. Deseret Mortuary Co., 455 P.2d 197 (Utah 1969). An obvious corollary to this principle is that ". . . a party cannot have a double recovery for the same loss." Brigham City Sand & Gravel v. Machinery Center, Inc., 613 P.2d

510, 511 (Utah 1980). In Utah, ". . . a plaintiff must show damages by evidence of facts and not by mere conclusions, and that the items of damage must be established by substantial evidence and not by conjecture." Highland Const. Co. v. Union Pacific R. Co., 683 P.2d 1042, 1045 (Utah 1984). According to the Utah Supreme Court:

> To prove damages, the plaintiff must prove two points. First, it must prove the fact of damages. The evidence must do more than merely give rise to speculation that damages in fact occurred; it must give rise to a reasonable probability that the plaintiff suffered damages as a result of a breach. Second, the plaintiff must prove the amount of damages.
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> * * *
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> While the standard for determining the amount of damages is not so exacting as the standard for proving the fact of damages, there still must be evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of damages.

Atkin, Wright & Miles v. Mountain States Telephone and Telegraph Co., 709 P.2d 330, 336 (Utah 1985) (emphasis added).[18] Simply stated, the plaintiff ". . . has the burden to produce a sufficient evidentiary basis to establish the fact of damages and to

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[18] Thus, unless the fact of damage is established, it is impermissible for the amount of damages to be based upon mere approximations. Atkin, Wright & Miles, 709 P.2d at 336; Bastian v. King, 661 P.2d 953 (Utah 1983).

permit the trier of fact to determine with reasonable certainty the amount of [claimed damages]." Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986).

Viewed in the light of these principles, it is obvious that the jury's damage award of $50,000 on the Franchisee's claim for breach of the implied covenant of good faith and fair dealing is unsupported by "substantial evidence," Highland Const. Co., 683 P.2d at 1045, that establishes a "reasonable probability" that damages occurred, Atkin, Wright & Miles, 709 P.2d at 336, in a "reasonabl[y]" certain amount. Id. The $50,000 award apparently was designed to compensate the Franchisee for a portion of the $158,206 in administrative and related fees that the Franchisee had paid to the Franchisor. (Tr. at R. 4521; Trial Exhibit P-11). These damages were based on paragraph 8 of the Franchise Agreements which required the Franchisor to provide the Paragraph 8 Services.[19] The Franchisee claimed a total loss of $158,206 from his supposed failure to receive the Paragraph 8 Services. (Tr. at R. 4521; Trial Exhibits P-11 and P-32). However, he adduced no evidence of the nature and extent to which he had failed to receive those Services.

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19 The nature of the Paragraph 8 Services is described at p. 14 supra.

The record is uncontroverted that the Franchisee received extensive help from the Franchisor in the completion of his sales summaries (Tr. at R. 4540-42, 4596, 5601, 5607); that the Franchisee received extensive customer account information (Tr. at R. 4593, 5727-30); that the Franchisee received parts lists (Tr. at R. 4760); that the Franchisee received the best available parts prices (Tr. at R. 4605);[20] that the Franchisee received the benefit of Franchisor's telephone service numbers (Tr. at R. 4764); that the Franchisee derived value from his use of the Franchisor's trade name (Tr. at R. 4626, 5725); that the Franchisee received extensive accounting services (Tr. at R. 4692, 5608-09);[21] that the Franchisee received valuable

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20 As noted at n. 11, supra, the Franchisee did adduce evidence that the Franchisor, like any other distributor, marked-up the price of its parts over cost before selling them to the Franchisor (Tr. at R. 4721). However, the Franchisee adduced no evidence quantifying the extent of such mark-ups and the extent, if any, to which he suffered legally cognizable damage from such mark-ups. (See e.g. Trial Ex. P-32 at 2).

21 As noted at n. 12, supra, the Franchisee did establish that the Franchisor's accounting system failed to properly track transactions on which "second inspection commissions" were to be paid. (Tr. at R. 4745). It was uncontroverted, however, that such transactions occurred only rarely and would have been an administrative "nightmare" to track. (Tr. at R. 4745, 5617).

Moreover, the Franchisor readily acknowledges that because the jury awarded the Franchisee damages of over $35,000 for earned but unpaid sales commissions, the Franchisee was arguably

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insurance coverage (Tr. at R. 5725); that the Franchisee received significant advertising benefits (Tr. at R. 4747-52); and that the Franchisee, in general, received the benefit of his bargain under paragraphs 8(a)-(d) of the Franchise Agreements. (Tr. at R. 4714-15, 5378-79).

Therefore, the only evidence even remotely establishing the Franchisor's failure to provide the Paragraph 8 Services consists of (i) the Franchisee's generalized concerns that the Franchisor unfairly marked-up the price of parts that it sold to him (but which were still the best available prices in the area, Tr. at R. 4605), (ii) the Franchisee's failure to properly track a few transactions on which "second inspection commissions" were to be paid (which amounts were included in the Miller Report on which the jury based its award of more than $35,000 for unpaid commissions) and (iii) Trial Exhibit P-11 which is a chart (admitted solely for illustrative purposes, Tr. at R. 4521-22) summarizing the manner in which the Franchisee calculated the amounts to which he believed he was entitled for unperformed Paragraph 8 Services. There is simply no evidence to establish

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entitled to recover from the Franchisor all fees and costs he incurred to have his accountant quantify his commission claims. However, the Franchisee adduced no evidence of what amount, if any, he paid his accountant for those services.

any amount of damages arising from the supposedly unperformed Services. Because the $50,000 award is so lacking in evidentiary support--both as to the fact of damage and the amount of damage--it cannot be sustained on appeal.

2. By the Terms of the Jury's Own Special Verdicts, Its Award of $5,891.35 to the Franchisee for the Franchisor's Breach of Contract Claims Set the Outer Limit on the Total Amount of Damages Recoverable on Those Claims. Those Damages Can Not Be Augmented by Resort to the Implied Covenant of Good Faith and Fair Dealing.

The jury's special verdicts on the Franchisee's breach of contract claims plainly states that the "total amount of all damage suffered by [the Franchisee] as a result of the Franchisor's breach[es]" of the Franchise Agreements was $5,891.35 (R. 3153, 3156, 3159).[22] (Emphasis added). The outer limit of recoverable damages on the breach of contract claims, therefore, was no more than $5,891.35. Notably, the Franchisee also sought additional damages to compensate him for his supposed failure to receive the Paragraph 8 Services for which he bargained under paragraph 8 of the Franchise Agreements. The obligation to perform the Paragraph 8 Services arose under an express provision of the Franchise Agreements. Therefore, any breach of that obligation could be recompensed only through the

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22 An accurate copy of these verdicts is reproduced at Tab "F" to the Franchisor's Appendix, infra.

Franchisee's breach of contract claims, not through his claim for breach of the implied covenant of good faith and fair dealing. For the law is clear that "an expressed agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature." Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).

Here, one of the "specific contract right[s]" that the Franchisee sought to vindicate through his breach of contract claims was the Franchisor's obligation to provide the Section 8 Services. The jury, however, capped the Franchisee's recovery on the breach of contract claims at $5,891.35. As a contract claim seeking damages based on a breach of specific contract obligation, the recovery of damages for failure to receive the Paragraph 8 Services could not exceed $5,891.35. These damages cannot be augmented under the guise of the covenant of good faith and fair dealing. The trial court erred in failing to recognizing this principle.

3. The Trial Court Should Have Required the Franchisee to Remit the $50,000 Damage Award as a Condition to Denying the Franchisee's Motion for New Trial.

A settled principle of post-trial relief is the process of remittitur. Under this concept, "the Court may condition a denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount. In this way, the

plaintiff is given the option of either submitting to a new trial or of accepting the amount of damages that the Court considers justified." Wright and Miller, Federal Practice and Procedure, § 2815 at 100 (1973).

Utah recognizes this principle. Under Utah R.Civ.P. 59(a)(5), a trial court is permitted to ". . . require a remission of part of the damages or suffer the consequences of a new trial." Duffy v. Union Pacific Railroad Co., 218 P.2d 1080 (1950) (quoted in Utah State Road Commission v. Johnson, 550 P.2d 216, 217 (Utah 1976)). Remittitur is available if the damage award is excessive to the point that it appears the jury failed to show due regard for the evidence or law applicable to the case. Paul v. Kirkendall, 261 P.2d 670, 671 (Utah 1953).

In this case, there is no defensible basis for the jury's imposition of compensatory damages of $50,000 on a claim for the implied covenant of good faith and fair dealing. The trial court erred in refusing to require the Franchisee to remit this damage award as a condition to denying the Franchisor's motion for new trial.

D. THE FRANCHISOR IS THE "PREVAILING PARTY" ON THE PARTIES' BREACH OF CONTRACT CLAIMS FOR PURPOSES OF RECOVERING ITS ATTORNEYS' FEES.

Both California[23] and Utah law allow attorneys' fees to be awarded to the "prevailing party" on a contract claim. The cases clearly establish that if, as in the case at bar, both parties prevail on affirmative claims, the party with the net judgment in its favor is the prevailing party entitled to attorneys' fees. Hughes Tool Co. v. Hinrichs Seed Co., 112 Cal. App. 3d 194, 169 Cal. Rptr. 160 (1980) (where judgment in favor of purchaser on its counterclaim for products liability and breach of implied warranty against purchaser for the unpaid balance of the note for the purchase price of the products, the purchaser was the party who was entitled to the recovery of attorneys' fees); Lachkar v. Lachkar, 182 Cal. App. 3d 641, 227 Cal. Rptr. 501 (1986) (there must be some "reckoning of the net success of the respective parties" to determine which of them is the prevailing party for purposes of recovering attorneys' fees. (Emphasis added). Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 556 (Utah App. 1989). (Under facts presented, "the party in

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23 The Franchise Agreements state that they ". . . shall be governed by and construed in accordance with the laws of the State of California." Franchise Agreements, ¶ 19.

whose favor the 'net' judgment is entered must be considered the 'prevailing party' and is entitled to an award of its fees.").

This principle compels the conclusion that the Franchisor, as the "net winner" on the parties' breach of contract claims is the prevailing party entitled to recover its attorneys' fees. The Franchisee's total recovery for breach of the Franchise Agreements is only $5,891.35; the Franchisor's total recovery on the Franchise Agreements is $10,000.[24] The Court should remand this issue to the trial court with instructions to determine the "net winner" in accordance with applicable law.

E. THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE NOTES AGAINST THE FRANCHISEE.

To finance the purchase of his franchises, the Franchisee signed and delivered to the Franchisor three Notes in the aggregate principal amount of $115,000. (Trial Exhibit V). At trial, the parties stipulated to have the issue of the Franchisee's ultimate liability on the Notes resolved by the court after

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[24] Moreover, to the extent the Franchisor obtains judgment against the Franchisee for the full unpaid principal balance of the Notes, the magnitude of the Franchisor's net success increases. Because the Franchisee's obligations to pay the Notes is created by paragraph 10(a) of the Franchise Agreements, the Franchisor's gross recovery on its counterclaim will then dwarf the Franchisee's gross recovery on his complaint on the contract claims. As such, it is the Franchisor that is and will be the "prevailing party" on the breach of contract claims.

trial. (Tr. at R. 5438-39). Under the stipulation, the parties agreed that the Franchisor had established a prima facie case for the imposition of liability on the Notes in a sum equal to their face amount ($115,000) less all proven payments ($11,826). (Tr. at R. 4521, 4583-84, 5438-39). The stipulation further provided that to the extent the jury determined that the Franchisee was legally excused from performance under the Franchise Agreements, the Court could consider that finding in fixing the Franchisee's liability on the Notes (Tr. at R. 5438-39). Without explaining its rationale, however, the court flatly denied the Franchisor's motion for judgment on the Notes. (Tr. at R. 4844). This decision was embodied in the Franchisee's final judgment. (R. 3891).

While the trial court did not expressly articulate the basis for its refusal to enter judgment on the Notes, it twice expressed concern about whether its decision should be ". . . influenced by the jury verdict." (Tr. at R. 4837-38). Specifically, the court was referring to the jury's four special verdicts that purported to relieve the Franchisee from any liability under the "parties' contracts." (R. 3181-82, App. "D"). The Court's consideration of these verdicts, however, was misplaced for at least two reasons. First, those verdicts, by definition, did not extend or apply to contracts (like the Notes) that were not submitted to the jury but instead reserved to the

court. The verdicts, as a matter of law, could have no effect on the court's decision of whether to enter judgment on the Notes; the jury did not address that issue and was not serving in an advisory capacity on any issue.

Second, by granting the Franchisee compensatory damages of approximately $86,000, the jury effectively compensated the Franchisee for his claimed losses; it granted him the benefit of his bargain. To further relieve the Franchisee from the fundamental obligation of paying for his franchises is an impermissible double recovery under Utah law. See Brigham City Sand & Gravel, 613 P.2d at 511. In other words, the Franchisee not only received compensation for his claimed losses, he was also completely relieved of any financial obligation for the 2 1/2 years' worth of benefits that he received from the Franchisor. These benefits were both extensive and valuable. They included the Franchisee's receipt of more than $200,000 of net compensation from the Franchisor (Trial Exhibit P-11); use of the FireMaster trademark, logos and good will (Trial Exhibits P-1, P-2 and P-3; Tr. at R. 4626, 5725); use of the Franchisor's confidential customer list (Tr. at R. 4593, 5727-30)[25]; the right to purchase

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25 The significant value of the customer list is evident from the fact that the Franchisor spent $240,000 to acquire it in 1987 (Tr. at R. 4635, 4644, 5698).

parts and equipment from the Franchisor at prices that the Franchisee acknowledged were the best available (Tr. at R. 4605); receipt of the Franchisor's training, counseling, seminars and technical consulting services (Tr. at R. 4751-52); receipt of the Franchisor's telephone answering, mail handling, accounting, bookkeeping, billing, collection and general sales assistance services (Tr. at R. 4540-42, 4596, 4692, 4764, 5607-09, 5378-79); receipt of the Franchisor's advertising (Tr. at R. 4747-52); and the right to conduct business under a highly visible and valuable trade name. In other words, the Franchisee's receipt of damages for the Franchisor's failure to provide the Paragraph 8 Services compensated the Franchisee for any losses he may have sustained in connection with his purchase of the franchises. To go further, as the trial court did, and in effect rescind the Notes confers an unwarranted windfall on the Franchisee. The Court should reverse the trial court's refusal to enforce the Notes and enter judgment on the Notes for the Franchisor in the principal amount of $103,174 plus interest.

F. THE TRIAL COURT IMPROPERLY AND PREJUDICIALLY ALLOWED THE FRANCHISEE TO URGE THE JURORS TO PLACE THEMSELVES IN THE FRANCHISEE'S SHOES TO DETERMINE WHETHER THE FRANCHISEE SHOULD BE REQUIRED TO HONOR HIS CONTRACTS.

At trial, the Franchisee spent considerable time and effort to convince the jury that the Franchisor's conduct released the Franchisee from liability under the parties' contracts. To support that effort, the Franchisee's legal counsel argued in his summation to the jury that it ought to place itself in the position of the Franchisee in deciding whether the Franchisee should be relieved of liability under the contracts. The Franchisee's counsel stated: "I am just certain that none of you would choose to be placed in that kind of a circumstance [of entering into contracts with the Franchisor], and, were you, that you would feel as though you had been forced into the decision to go into debt." (Tr. at R. 5478). In response to that statement, the Franchisor's legal counsel immediately objected: "Your Honor, I'm going to move that that last sentence be stricken, it is a violation of the Golden Rule of trial tactics." Id. The Court, in overruling the objection, rebuked the Franchisor's counsel by saying that the Franchisee's statement was simply permissible "argument." Id. The trial court was wrong.

The law is well settled:

> Generally, it is impermissible for counsel, in argument, to refer to the 'Golden Rule' per se, or otherwise allude to the rule, such

> as by urging the jurors to place themselves in the position of one of the parties in the litigation, or to grant a party the recovery they would wish themselves if they were in the same position.

G. Stein, Closing Argument, § 60, at 159 (1985). Such an argument is "improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Rojas v. Richardson, 703 F.2d 186, 191 (5th Cir. 1983). Although it appears that this issue has not been addressed by the Utah courts, the prohibition applies without exception in numerous other jurisdictions. See e.g., Fountain v. Phillips, 439 So.2d 59, 63 (Ala. 1983); Beaumaster v. Crandall, 576 P.2d 988, 994 (Alaska 1978); Brokopp v. Ford Motor Co., 139 Cal. Rptr. 888 (1977); Delaware Olds, Inc. v. Dixon, 367 A.2d 178, 179 (Del. 1976).

Although it is recognized that an appeal to the jurors to put themselves in a litigant's place does not always constitute reversible error, Faught v. Washam, 329 S.W.2d 588 (Mo. 1959), an argument of this type is almost always prejudicial or reversible error in a case where, as here, (i) counsel made a timely objection, (ii) counsel sought curative action, (iii) no jury instruction was given to disregard the improper argument, (iv) the argument was not withdrawn by counsel, (v) the argument was not justified in response to earlier remarks by the objecting

counsel, and (vi) the trial court refused to grant a suitable remittitur. G. Stein at 161.

To say that counsel's argument affected the Franchisor's substantial rights in this case would be something more than understatement. The Franchisor's argument was calculated to induce the jury to issue special verdicts releasing the Franchisee from any liability under his contracts with the Franchisor--something the jury did indeed do. (R. 3181-82, App. "D"). The importance that the trial court attached to the jury's findings is clear. During the post-trial hearing on the Franchisor's motion to impose liability on the Franchisee for the full balance of the Notes, the trial court twice asked the Franchisor's counsel whether its decision on the Notes should be "influenced by the jury verdicts." (Tr. at R. 4837-38). Despite the Franchisor's arguments to the contrary, the Court flatly refused to enter judgment on the Notes. Id. at 4844.

It is clear, therefore, that the jury's four special verdicts relieving the Franchisee from any liability under the parties' contracts and the Court's subsequent decision to relieve the Franchisee from liability on the Notes was prejudicially induced by counsel's improper use of the Golden Rule argument. The trial court's failure to sustain the Franchisor's objection to the argument or otherwise take action to ameliorate the

effects of that decision constitutes reversible error. The Franchisor is entitled to a new trial free from the taint of the Franchisee's improper trial tactics.

G. THE TRIAL COURT IMPROPERLY REFUSED TO MAKE PERMANENT THE PRELIMINARY INJUNCTION TO ENJOIN THE FRANCHISEE FROM EXPLOITING THE FRANCHISOR'S CONFIDENTIAL CUSTOMER INFORMATION.

Shortly after the Franchisee instituted this action, the Franchisor sought and obtained an Injunction preliminarily enjoining the Franchisee and his agents from exploiting the Franchisor's confidential customer information. (R. 740-99). The Injunction was rooted in several sources. First, paragraph 14 of the Franchise Agreements plainly establishes the confidentiality and protectability of the Franchisor's customer list. It provides for the recovery of liquidated damages that is ". . . without prejudice to the Franchisor's right to injunctive relief to abate such unlawful conduct." Second, the Trade Secret Agreement (Trial Exhibit V) states that the Franchisee ". . . understand[s] and agree[s] that the [Franchisor] is entitled by virtue of this Agreement to seek and obtain a permanent injunction against such breach [of the Trade Secret Agreement through the Franchisee's improper use of the Franchisor's confidential information]." Third, it is well settled in Utah that confidential or proprietary information easily qualifies for

protection through injunctive relief. Microbiological Research Corp. v. Muna, 625 P.2d 690 (Utah 1983) (former employee's misappropriation of secret manufacturing process constitutes unfair competition that can be enjoined).

The case for the imposition of a permanent injunction became compelling at trial. The jury issued a special verdict that expressly stated that (i) the Franchisor's customer list derived independent economic value from not being generally known to the public, (ii) the Franchisor took reasonable efforts under the circumstances to maintain the secrecy of its customer list, (iii) the Franchisee improperly used the Franchisor's customer list for his own benefit, and (iv) the Franchisor suffered damages of $10,000 as a result of the Franchisee's improper use of the list. (R. 3192-94; App. "E"). Therefore, the jury determined that the Franchise Agreements (and, with them, their confidentiality provisions) are conclusively binding upon, and enforceable against, the Franchisee.

Rather than entering a permanent injunction consistent with the jury's findings, the trial court decided to require the Franchisee to make a so-called "equitable payment" of $11,014 to the Franchisor. (R. 3728). The trial court never disclosed how it arrived at this amount. Given that FireMaster paid $240,000 to acquire the customer list some three years before, see Tr. at

R. 4635, 4644 and 5698, and given the jury's finding that the customer list was unqualifiedly valuable and protectable, see R. 3192-94, there appears to be no principled basis for the trial court's refusal to permanently enjoin the Franchisee from exploiting the customer lists in violation of the Franchise Agreements. Moreover, the trial court compounded its error by refusing to allow the Franchisor to post any amount of bond to stay dissolution of the preliminary Injunction. (R. 3791).[26] It simply set an expiration date of some two months in the future without any possibility of a stay.

The trial court abused its discretion in refusing to make permanent the preliminary Injunction and refusing to allow the Franchisor to post a bond to stay its dissolution of the preliminary Injunction. Its decision should be reversed; as a matter of law, the preliminary injunction should be made permanent.

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[26] This action forced the Franchisor into the statistically unfavorable posture of immediately petitioning the Utah Supreme Court for a writ of mandamus compelling the trial court to revisit this issue and allow the Franchisor to post an appropriate bond. Like most requests for extraordinary relief, the Supreme Court denied the Franchisor's petition.

VII.

CONCLUSION

This proceeding was punctuated by prejudicial error at nearly every stage. Error was committed in the trial court's refusal to grant a reasonable continuance, in its failure to protect the Franchisor from the Franchisee's improper trial tactics, in its failure to grant a new trial or take other appropriate action in the face of the jury's inconsistent special verdict findings, in its failure to strike the jury's patently unsupported verdict of $50,000 on the Franchisee's good faith and fair dealing claim, in its failure to enforce the Notes or make permanent the Injunction against the Franchisee, and in its failure to properly award attorneys' fees to the Franchisor. Any one of these defects standing by itself probably supports a new trial. When aggregated, however, they present a compelling case for such relief. The court should vacate the Franchisee's Judgment and remand this case for a new trial.

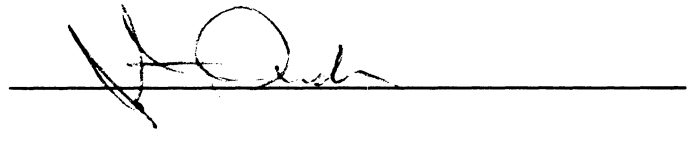
DATED this 14 day of July, 1992.

JOHN T. ANDERSON
of and for
PARSONS BEHLE & LATIMER
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid four true and correct copies of the foregoing BRIEF OF APPELLANT to the following on this 17 day of July, 1992:

Richard N. Bigelow
900 First Interstate Bldg.
170 South Main Street
Salt Lake City, Utah 84111



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ATTACHMENT A

Franchise Territory #1 SCC/East/Centra

FRANCHISE AGREEMENT

between

MASTER PROTECTION ENTERPRISES
(Franchisor)

and

Brad Hollands
(Franchisee)

FASS8.11/86

EXHIBIT "B"

MASTER PROTECTION ENTERPRISES

FRANCHISE AGREEMENT

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FRANCHISE AGREEMENT

AGREEMENT made this 11th day of April, 1988 by and between MASTER PROTECTION ENTERPRISES, a corporation of the State of California, and having its principal place of business at 2684 Lacy Street, Los Angeles, California 90031, (hereinafter referred to as "FRANCHISOR"), and Brad Hallock, a (corporation/partnership/individual) of the State of Utah, and having its principal place of business/residence at 1234 Alameda Ave. Salt Lake City, Utah 84102, (hereinafter referred to as "FRANCHISEE").

WHEREAS, FRANCHISOR has expended time, effort and money to acquire unique experience, special techniques, and knowledge with reference to the Business of the design, fabrication, sale, installation and servicing of fire protection systems throughout the United States and certain foreign countries (hereinafter referred to as the "Business"); and

WHEREAS, FRANCHISOR has conducted, and continues to conduct, such Business under the trade name, trademark and service mark MASTER PROTECTION ENTERPRISES, as well as under certain other trademarks and service marks as are set forth in Schedule "A" hereto (hereinafter all of said trade names, trademarks and service marks shall be referred to collectively as the "MARKS"); and

WHEREAS, the MARKS have become uniquely associated with the products and services of FRANCHISOR throughout the United States and certain foreign countries; and

WHEREAS, FRANCHISEE acknowledges the value of the MARKS and of the FRANCHISOR's unique experience, special techniques, and knowledge with respect to the design, fabrication, sale, installation and servicing of fire protection systems, and suppression equipment including detection, along with special experts in codes enforcement requirements and desires to obtain the right to render certain services in connection with the Business of FRANCHISOR and to utilize the MARKS therewith; and

WHEREAS, FRANCHISEE desires to be trained and assisted by FRANCHISOR in the rendering of said certain services as is or may be necessary for the uniform and proper rendering of said services in accordance with the standards and policies set and maintained by FRANCHISOR; and

WHEREAS, FRANCHISEE recognizes and acknowledges the great importance to FRANCHISOR, to the Business and to other of FRANCHISOR's Franchisees of performing said certain services with the highest quality of care, and the tremendous impact these services have relative to the life safety and property protection of FRANCHISOR's clients, which include the maintenance of distinctive features of the Business to the public and to the trade in order to maintain the integrity, reputation and good will of FRANCHISOR in the minds of the public and the trade;

NOW, THEREFORE, in consideration of the promises and premises, hereinafter set forth below, and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto do hereby agree as follows:

1. DEFINITIONS:

For the purpose and duration of this Agreement, the following definitions shall apply:

a) "The Business": means the design, fabrication, sale, installation and servicing of fire protection systems and suppression equipment including detection, along with special experts in codes enforcement requirements by FRANCHISOR with respect to both the public and private sectors.

b) "The Marks": means the trade names, trademarks and service marks set forth in Schedule "A" hereto owned by FRANCHISOR and licensed hereunder to FRANCHISEE.

c) "The Services": means those certain specific services to be rendered by FRANCHISEE and in connection with the Business to FRANCHISOR's customers, as set forth in Schedule "B" hereto.

d) "The Territory": means the geographic and otherwise specifically stated location(s) set forth in Schedule "C" hereto in which FRANCHISEE shall have the right to render the specific Services and to use the MARKS pursuant to this Agreement.

e) "Customers": means those companies' services accounts heretofore acquired by FRANCHISOR in the course of conduct of the Business (i) which are located in the Territory, and (ii) which were serviced during the one (1) year period prior to the date of this Agreement by either FRANCHISEE as an Independent Contractor, or a prior Contractor or

Franchisee authorized by FRANCHISOR to service such accounts. Geographic or otherwise, the Territory does not include customer accounts serviced during said one-year period by any other Independent Contractor or Franchisee unless otherwise provided in an amendment to this Agreement. Notwithstanding the foregoing definition, however, FRANCHISOR shall have the right to exclude from the Customer service accounts which would otherwise be Customers' hereunder. Customer service accounts in any of the following classes or categories (such exclusions, if any, shall be made in accordance with FRANCHISOR's sole business judgement):

1) Governmental entities at all levels (federal, state, county and municipal) and agencies and bureaus of such governmental entities;

2) Civic organizations, such as by way of illustration and not limitation, civic auditoriums, music and performing arts centers and convention centers, whether or not sponsored, affiliated with or supported by any governmental entity;

3) Institutions of education, including public school districts, community colleges, state colleges and university and private schools and colleges; and

4) Accounts having multiple buildings, facilities, branches, outlets or the like in one or more franchised territories (sometimes referred to hereinbelow as a "Chain Account Customer" or "National Account."

f) "Gross Profit": means the total charge to Customers less any of the following charges if included in the total invoice prices: (i) the prices of supplies and/or equipment purchased from FRANCHISOR; (ii) sales or other taxes; and (iii) charges for shipping such supplies and/or equipment purchased from FRANCHISOR.

2. FRANCHISE GRANT:

FRANCHISOR hereby grants to FRANCHISEE the right to engage in the Business of rendering the specific Services to FRANCHISOR's Customers in the Territory for the term of this Agreement, pursuant and subject to the terms, provisions and conditions of this Agreement. However, notwithstanding the foregoing grant, under any of the circumstances described immediately below, FRANCHISEE agrees that FRANCHISOR shall have the right to assign or re-assign the Customer(s) involved to another Franchisee or Independent Contractor:

a) In the event FRANCHISOR, in its reasonable discretion, determines FRANCHISEE lacks the skills, equipment, time and/or resources required to service a Customer to the standards of quality required by FRANCHISOR, or that FRANCHISEE is unwilling to render Services to a Customer in the Territory; or

b) In the event of emergency conditions under which, in FRANCHISOR's reasonable discretion, the assignment of responsibility to another Franchisee or to itself is in the best interests of the Customer's health and safety; or

c) In the event a Customer in the Territory requests that FRANCHISOR, or one of its contractors, or another franchisee render the Services, and FRANCHISOR, in its sole business judgement, determines that such request is reasonably justified; or

d) In the event a Customer in the Territory refuses to do business with FRANCHISEE, and FRANCHISOR, in its sole business judgement, determines that such refusal is reasonably justified.

Under the circumstances described in sub-parts 2(a),(c) and (d) immediately above, (i.e., circumstances other than an emergency situation), FRANCHISOR will apply its best efforts to notify FRANCHISEE of the re-assignment of the Customer(s) involved.

3. SERVICE MARK LICENSE:

FRANCHISOR hereby grants to FRANCHISEE an exclusive license to use the MARKS within the Territory solely in connection with the Services of FRANCHISEE, for the term of this Agreement, pursuant and subject to the terms, provisions and conditions of this Agreement. FRANCHISEE agrees to use the MARKS in connection with, and exclusively for, the promotion and conduct of the Business of the FRANCHISEE, and in accordance with instructions, rules and procedures prescribed by FRANCHISOR from time to time with respect thereto, including, but not limited to the following:

a) FRANCHISEE recognizes and acknowledges that FRANCHISOR is the sole and exclusive owner of the MARKS and agrees that FRANCHISEE will not register or attempt to register such MARKS in FRANCHISEE's own name, or in the name of any other person, firm or corporation.

b) FRANCHISEE may use the terms "authorized by Master Protection Enterprises, Inc." or "Authorized Representative of Master Protection Enterprises, Inc.," or any term substantially similar thereto, in connection with the Services during the duration of this Agreement, which term may be preceded or followed by FRANCHISEE's own individual, trade or corporate name and address. At no time may FRANCHISEE use any or all of the MARKS as part of FRANCHISEE's trade or corporate name, nor directly, nor individually represent that FRANCHISEE has any connection or affiliation with FRANCHISOR other than the relationship created by this Agreement.

c) FRANCHISEE shall cause to appear on all advertising, promotional or display materials appropriate presentation of the MARKS in the form prescribed by FRANCHISOR, including any and all notices and/or legends as shall from time to time be prescribed by FRANCHISOR.

d) FRANCHISEE shall not during the term of this Agreement or thereafter, attack the title or any rights of FRANCHISOR in and to the MARKS. Upon request by FRANCHISOR, FRANCHISEE

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shall cooperate fully with and in good faith assist FRANCHISOR to the extent necessary in the procurement of any protection or to protect FRANCHISOR's rights, title and interest in and to the MARKS.

e) Upon the termination of this Agreement, FRANCHISEE agrees to immediately cease and forever abstain from any and all use of the MARKS and shall turn over to FRANCHISOR all documents, instructions, display items, and the like bearing any or all of the aforesaid MARKS, which will include removing all such MARKS from trucks and uniforms and any other place the MARK is displayed within 48 hours of termination.

f) This license shall not be transferable other than as provided in Paragraph 13 following.

4. OPERATION OF THE FRANCHISE:

a) FRANCHISEE agrees to render the Services pursuant to this Agreement to FRANCHISOR's Customers in a courteous and efficient manner, pursuant to and in conformity with reasonable instructions, specifications, standards and procedures of operation as shall from time to time be set forth and/or approved by FRANCHISOR. FRANCHISEE agrees further that changes in such instructions, specifications, standards and procedures may become necessary from time to time and agrees to accept as reasonable such modifications, revisions and additions thereto which FRANCHISOR, in the good faith exercise of its judgement, believes to be necessary.

b) FRANCHISEE agrees to apply its best efforts to perform the Services for FRANCHISOR's Customers within the Terrritory, FRANCHISOR shall, on a monthly basis, supply FRANCHISEE with the names, addresses and service requirements of its Customers in the Territory. FRANCHISEE shall have the responsibility to set up its own appointments with each such Customer. Further, during the course of Business and from time to time, FRANCHISOR will furnish FRANCHISEE emergency calls received by FRANCHISOR which require immediate response. FRANCHISEE agrees to timely render the necessary Services in a workmanlike manner within twenty-four (24) hours of such request.

c) FRANCHISEE agrees to provide its own transportation, which shall meet the FRANCHISOR type and color specifications, and proper tools and equipment to maintain the same in good working condition, and to maintain a sufficient inventory of materials and supplies necessary to perform the Services. FRANCHISOR shall from time to time supply FRANCHISEE with lists of equipment and supplies required by FRANCHISOR to enable FRANCHISEE to properly perform the Services. FRANCHISEE may purchase the required equipment and supplies either directly from FRANCHISOR or from an approved source, provided that such equipment and supplies meet the quality standards of FRANCHISOR and that the written consent of FRANCHISOR is first obtained, which consent FRANCHISOR will not unreasonably withhold.

d) FRANCHISEE shall have the right, upon written consent of FRANCHISOR, to retain and render the Services to its own customer service accounts within the Territory, provided that said FRANCHISEE customer service accounts were validly and in good faith acquired by FRANCHISEE prior to the execution of this Agreement subject, however, to FRANCHISOR's right and option to purchase each said FRANCHISEE customer service account from FRANCHISEE. FRANCHISOR, upon exercise of its right and option to purchase each said FRANCHISEE customer service account, and in consideration of the purchase of each such account, shall pay to FRANCHISEE a sum equal to ten percent (10%) of the Gross Profit on FRANCHISEE's initial annual service call on such account. It is further understood and agreed that all customer accounts located in the Territory which are acquired after the date of this Agreement, however acquired, shall be the accounts of FRANCHISOR. Unless otherwise excluded by FRANCHISOR pursuant to any of the provisions of Paragraphs 1(e) or 2 above, such new accounts shall be Customers which FRANCHISEE shall have the right to service hereunder.

1) If FRANCHISEE secures a new customer service account located within the Territory <u>without</u> the support or sales assistance of FRANCHISOR's sales personnel, in consideration of FRANCHISEE's efforts in securing each such new Customer, FRANCHISOR shall pay over to FRANCHISEE an additional amount equal to ten percent

(10%) of the Gross Profit on the initial annual service call on each such new Customer (excluding any emergency or other type of service call made prior or subsequent to said first annual service call).

2) If FRANCHISOR acquires new customer service accounts located in the Territory as a result of, by way of illustration only, its purchase of a customer list or its acquisition of a company engaged in the Business, then, in consideration of FRANCHSIOR's efforts and expenses incurred in securing such new service accounts (which accounts become Customers hereunder, unless excluded under Paragraphs 1(e) and 2 above), FRANCHISEE shall either:

a) pay over to FRANCHISOR by permitting FRANCHISOR to withhold from amounts otherwise payable to FRANCHISEE pursuant to Paragraph 8(e), an additional amount equal to twenty-five percent (25%) of the Gross Profit on the initial annual service call on each such new Customer (excluding any emergency or other type of service call made prior or subsequent to said first annual service call); or

b) add to the balance of the Franchise Fee due from FRANCHISEE to FRANCHISOR the amount of the money expended by such new Customer for the Services of the Franchised Business during the one (1)

year period immediately preceding FRANCHISOR's acquisition thereof as a new service account.

e) FRANCHISEE shall have the right to hire its own employees and support personnel with respect to the conduct of its Business under this Franchise and the Services rendered thereunder, provided that FRANCHISEE shall be required to properly train, license and equip such employees (subject to all of FRANCHISOR's requirements as are set forth in this Agreement) in the techniques and procedures of FRANCHISOR, either by requiring that said employees attend training sessions offered by FRANCHISOR from time to time, or by obtaining FRANCHISOR's approval of FRANCHISEE's own training program and its standards for selecting and qualifying its employees, which approval shall not be unreasonably withheld.

f) FRANCHISEE shall have the right to set its own price schedule for Services rendered to Customers in the Territory with the exception of those Customers of FRANCHISOR which are "Chain Account Customers" or "Price By Office" accounts. A "Chain Account Customer" or "Price By Office" ("PBO") account means a Customer having branches, outlets or the like in one or more franchised territories and which requires by contractual agreement between FRANCHISOR and the Chain Account Customer or PBO account that all Services rendered thereto be at one rate agreed to by FRANCHISOR and the Chain Account Customer or PBO. FRANCHISEE will have the right to

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refuse to render Services to any Chain Account Customer or PBO in the Territory at the rate required by FRANCHISOR, in which event FRANCHISEE shall so advise FRANCHISOR in writing within five (5) days after FRANCHISEE has received from FRANCHISOR the first monthly Customer list on which such Chain Account Customer or PBO appears. FRANCHISEE acknowledges and agrees that FRANCHISOR shall then have the right, upon receipt of such written notice, to assign such Chain Account Customer or PBO in the Territory to another Franchisee, or to render the Services to such Chain Account Customer or PBO account itself until another Franchisee is assigned to service it. FRANCHISOR shall from time to time supply FRANCHISEE with a recommended rate schedule which FRANCHISEE may use as a guideline in establishing minimum and maximum rates for services and materials. FRANCHISEE shall not be bound by FRANCHISOR's schedule, but those rates set by FRANCHISEE should bear some reasonable relation thereto, and FRANCHISEE should not exceed the upper limit without special justification such as difficult geographic locations, specific hours of service, etc., and any substantial deviation therefrom by FRANCHISEE shall be based upon economic and business conditions applicable to FRANCHISEE.

g) FRANCHISEE shall have the right to offer Services to Customers on credit terms to be determined in the reasonable discretion of FRANCHISEE, subject to the relevant provisions of state and federal law. FRANCHISEE agrees that it will

bear all risks under any credit payment program it establishes.

h) FRANCHISEE shall prepare invoices to all Customer service accounts which it services within the Territory on forms prescribed by FRANCHISOR (and available from FRANCHISOR at a reasonable charge). Such invoices shall be sent to FRANCHISOR, on a weekly basis, for processing and mailing by FRANCHISOR.

i) FRANCHISEE shall have the right to advertise its Services, independently from any FRANCHISOR advertising, provided that FRANCHISOR shall have the right of prior approval of any and all advertisements to ascertain that the MARKS are properly used therein and to insure that the reputation and goodwill of FRANCHISOR, its Business and other Franchisees, are not subjected
to any risk of an adverse or negative impression created by such advertisements.

j) FRANCHISEE agrees to meet and maintain the minimum annual sales quotas agreed upon between FRANCHISOR and FRANCHISEE, which minimum annual sales quotas are set forth in Schedule "D" appended hereto and incorporated herein by reference. FRANCHISEE agrees and acknowledges that the required minimum annual sales quotas shall be deemed a material term of this Agreement, the breach of which shall give FRANCHISOR the right to terminate this Agreement in accordance with the provisions of Paragraph 11 (b) hereof.

5. QUALITY CONTROL:

FRANCHISEE agrees to perform the Services and to maintain the proper equipment and inventory at a standard of quality at least equal to that established by FRANCHISOR, and further agrees to adhere to those techniques and procedures set forth by federal, state and municipal laws and regulations, as well as by applicable Fire Marshal regulations.

FRANCHISOR shall have the right, upon timely notice to FRANCHISEE, to inspect FRANCHISEE's books, records, equipment, inventory and methods of operation to insure that FRANCHISEE is operating the FRANCHISE at the requisite standards set forth by FRANCHISOR. FRANCHISEE understands and agrees that changes in standards, specifications and procedures may become necessary from time to time and agrees to accept, as reasonable, such modifications, revisions and additions thereto which FRANCHISOR, in the good faith exercise of its judgment, believes to be necessary. From time to time as a routine procedure or in response to a Customer complaint or quality control inspection, FRANCHISOR may determine that the Service performed by the FRANCHISEE has been improper or not in accordance with this Agreement, in which event FRANCHISOR shall have, and hereby reserves the right (for the safety and goodwill of its Customers) to properly reservice the work in accordance with FRANCHISOR's standards and shall charge the FRANCHISEE for the material and labor expended to bring the service up to the required standard. FRANCHISOR will use its best efforts to have the FRANCHISEE perform the reservice

but reserves the right to use its best judgement as to the safest and most efficient means of accomplishing said reservice.

6. FRANCHISEE'S RECORDS:

FRANCHISEE agrees to maintain, at its own expense, true and accurate records, reports, accounts, books and data which shall accurately reflect the daily operation of the franchise granted hereunder which shall be in accordance with good standard accounting practices. FRANCHISEE agrees to permit FRANCHISOR and/or its duly authorized representative access to FRANCHISEE's premises during normal business hours to inspect and examine the above-referenced records, reports, accounts, books and data.

FRANCHISEE also agrees to provide financial statements reflecting the operation of the Franchise Business to FRANCHISOR on no less than an annual basis or from time to time as shall be reasonably requested by FRANCHISOR.

All information to be furnished to FRANCHISOR hereunder shall at all times be accurate and correct in all material respects to enable FRANCHISOR to have accurate and correct knowledge of FRANCHISEE's business operations hereunder.

The failure or refusal of FRANCHISEE to furnish any statements or financial information to FRANCHISOR, as required hereunder within fifteen (15) days after its due date, or the existence of any unexplained discrepancy of ten percent (10%) or more in the amount of any figure thereon, shall be deemed a default under this Agreement.

7. TRAINING PROGRAM:

a) FRANCHISOR agrees to provide FRANCHISEE with a training program to properly instruct FRANCHISEE in all procedures and techniques required by applicable federal and state laws in the specific field of fire protection, as well as in the operation and service of equipment and supplies to be used by FRANCHISEE in the performance of the Services hereunder. Such training program shall last approximately one month and may consist of seminars, lectures and "hands-on" field training with another of FRANCHISOR's Franchisees.

FRANCHISOR shall also provide, from time to time, periodic lectures and seminars to update the above-referenced training program. FRANCHISEE will be required to attend no less than three organized seminars per year, without compensation from FRANCHISOR. FRANCHISEE, at its option, may attend additional seminars without compensation from FRANCHISOR.

b) FRANCHISEE agrees to obtain all necessary and required licenses from applicable federal, state and/or local agencies, and to provide copies of each such license to FRANCHISOR prior to commencement of the training program by FRANCHISEE. FRANCHISEE agrees to attend and complete the training program to the satisfaction of FRANCHISOR, including obtaining a satisfactory passing grade on both the written and physical tests given at the conclusion of said program. FRANCHISEE acknowledges and agrees that obtaining

the above-referenced licenses prior to participation in the training program and the successful completion by FRANCHISEE of the training program are material aspects of this Agreement and that in the event of the failure of FRANCHISEE to successfully obtain said licenses and/or complete said program within a reasonable time after the execution of this Agreement, FRANCHISOR shall have the right to terminate this Agreement and return to FRANCHISEE any monies paid by FRANCHISEE, less necessary administrative costs and expenses incurred by FRANCHISOR in connection with such termination, and less any outstanding accounts receivable due MPE by FRANCHISEE for materials purchased and consumed.

8. OBLIGATIONS OF FRANCHISOR:

In order to assist FRANCHISEE in the performance of the Services hereunder, FRANCHISOR hereby agrees as follows:

a) FRANCHISOR shall provide FRANCHISEE with a list of Customer service accounts within the Territory to be serviced by FRANCHISEE each month;

b) FRANCHISOR shall provide FRANCHISEE with the following documents which shall, from time to time, be revised at the discretion of FRANCHISOR:

i) Required equipment and supply inventory lists;

ii) Service, equipment and supply instructions, manuals, specifications and/or guidelines;

iii) Service and installation rate guidelines;

iv) Sales and marketing guidelines and information; and

v) Technical support, when requested, at a specific hourly fee to be set by FRANCHISOR, from time to time.

c) FRANCHISOR, at the FRANCHISOR's location, will also provide additional "General Services," which shall include, but not necessarily be limited to: (i) telephone answering and mail handling services; (ii) administrative services, including accounting, bookkeeping, billing and collection services, general sales assistance and general advertising; and, at the option of FRANCHISEE, (iii) FRANCHISOR will provide "Special Services" which shall include, but not necessarily be limited to specific advertising and specific sales assistance, and engineering and technical support services. FRANCHISOR shall charge FRANCHISEE for any Special Services requested by FRANCHISEE, as aforesaid, on a reasonable time and materials basis.

d) FRANCHISOR, upon the receipt of FRANCHISEE's monthly invoices and billing statements, shall be responsible for billing Customers and collecting payments therefrom. FRANCHISOR shall keep a true and accurate record of all Customer invoices submitted by FRANCHISEE and billed by FRANCHISOR.

e) FRANCHISOR shall account to FRANCHISEE, twice each month, the total amount of receipts derived from the billing of Customers located in the Territory, and shall determine the Gross Profit therefrom (more specifically, the portion

of the Gross Profits actually collected from such Customers). FRANCHISOR shall remit to FRANCHISEE the sum equal to Forty-Three percent (43 %) of the Gross Profits from FRANCHISEE's invoices in the Territory collected during the immediately preceding month, less any fees for Special Services due and outstanding from FRANCHISEE, said sum to be remitted in two (2) installments each month. The remainder of the Gross Profits collected from FRANCHISEE's invoices during the month immediately preceding shall be retained by FRANCHISOR as consideration for its foregoing services which FRANCHISOR is committed to provide FRANCHISEE pursuant to the provisions of this Paragraph 8. It is understood and agreed that FRANCHISOR shall remit payments to FRANCHISEE only on amounts actually collected from invoiced Customer service accounts.

f) Collection and Accounts Receivable will be the mutual responsibility of the parties. Each party will use its best efforts towards collection of all outstanding sums owed. All cash sales received by FRANCHISEE in the operation of the franchise shall be turned over to FRANCHISOR for distribution and accounting during the appropriate accounting period. FRANCHISOR, in the event of non-payment by a Customer billed on account by FRANCHISEE, may, in its sole discretion, at its own expense and in its own name, institute any and all legal proceedings necessary to collect on such account. If FRANCHISOR elects to institute a

collection proceeding and should FRANCHISOR recover money, whether by judgment or settlement, FRANCHISOR shall with respect to any such recovery remit to FRANCHISEE the sum equal to fifty percent (50%) of such recovery after the deduction of actual court costs and reasonable attorney's fees. FRANCHISEE shall actively participate and cooperate in all collection efforts including personal visits to delinquent Customers. Alternatively, FRANCHISEE, at its sole option, may purchase the accounts receivable for the face amount thereof less the FRANCHISOR's portion of the gross profit, and may then collect and retain the entire amount due on its own account.

9. INSURANCE AND INDEMNIFICATION:

a) FRANCHISEE agrees to obtain in its own name and at its own expense, public liability insurance with limitations of no less than One Hundred Thousand/Three Hundred Thousand Dollars ($100,000/$300,000) and property damage insurance with limitations of no less than One Hundred Thousand/Three Hundred Thousand Dollars ($100,000/$300,000), naming FRANCHISOR as co-insured. FRANCHISEE agrees to maintain adequate Workmen's Compensation Insurance, Employer's Liability Insurance, Unemployment and Unemployment Disability Compensation Insurance on all of FRANCHISEE's employees, and to pay any and all required Withholding, Social Security and any other applicable federal and state

taxes therefor, in accordance with the laws of the State of California and the United States.

b) All policies provided for herein shall be with companies approved by FRANCHISOR, which approval shall not be unreasonably withheld. Certificates of insurance evidencing the policies provided for herein shall be delivered to FRANCHISOR as soon as practicable within a reasonable time following execution of this Agreement and shall specify that the policies name FRANCHISOR as an additional insured or beneficiary as the case may be, and that said policies may not be cancelled or altered without twenty (20) days prior written notice to FRANCHISOR. The Certificate evidencing the comprehensive liability policy shall provide that coverage is primary and insures the performance of the indemnity set forth in Paragraph 9(c)(i) of this Agreement immediately below, and any coverage maintained by FRANCHISOR is in excess thereto.

c) Indemnification:

i) By FRANCHISEE:

FRANCHISEE agrees during and after the term of this Agreement to indemnify and hold harmless FRANCHISOR from and against any and all loss, damage, liability, attorney's fees and other costs or expenses incurred by FRANCHISOR as a result of any violation of this Agreement by, or any act of omission or commission on the part of, FRANCHISEE or any of its employees,

servants or agents and from all claims, damages, classes in actions, suits or rights of any person, firms or corporations arising from FRANCHISEE's operation of the Franchised Business, except as may otherwise be provided herein.

ii) By FRANCHISOR:

FRANCHISOR agrees during and after the term of this Agreement to indemnify and hold harmless FRANCHISEE up to the aggregate amount of any and all monies paid to FRANCHISOR by FRANCHISEE hereunder, from and against any and all loss, damage, liability, attorney's fees and other costs or expenses incurred by FRANCHISEE as a result of any claim or cause of action brought by or on behalf of a third party alleging infringement of trademark rights by FRANCHISEE arising from the use of the MARKS in the operation by FRANCHISEE of the Franchised Business pursuant to this Agreement.

10. CONSIDERATION:

a) Franchise Grant: In consideration of the grant by FRANCHISOR to FRANCHISEE of the exclusive right to render the Services to FRANCHISOR's Customers in the Territory, and to use the MARKS in connection therewith, FRANCHISEE agrees to pay over to FRANCHISOR a "Franchise Fee" in the amount of Seventy THOUSAND DOLLARS ($ 70,000.00), which sum shall be payable as follows:

i) $ 0 upon execution of this Agreement;

ii) $ 0 within 0 days of execution;

iii) $70,000.00 in monthly installments of $411.22,

iv) $411.22 monthly thereafter until the balance of principal and interest are paid, in accordance with the terms set forth in a Promissory Note in the form attached hereto as Schedule "E" and the Addendum. The first such monthly installment shall be paid over to FRANCHISOR on the first day of the next calendar month which is at least thirty (30) days after the date of execution of this Agreement, the remaining installments shall be paid to FRANCHISOR on the first day of each month thereafter.

b) Cash Discount: As an alternative to the above-prescribed terms for payment of the Franchise Fee, FRANCHISEE may elect to pay the same in cash, in which event FRANCHISEE will be entitled to a twelve percent (12%) cash discount of the Franchise Fee, reducing the same to N/A Dollars ($).

11. TERMS AND TERMINATION:

This Agreement shall commence as of the execution date hereof and shall continue unless and until terminated by the occurrence of one or more of the following:

a) Termination of Franchisee: FRANCHISEE shall have the right to terminate this Agreement, without cause, upon sixty (60) days notice in writing to FRANCHISOR, provided that

during such notice period FRANCHISEE shall continue the operation of the Franchised Business, as if notice had not been given.

i) If such notice of termination is received by FRANCHISOR prior to the first anniversary of the date of this Agreement, and if FRANCHISEE is not in default or breach of any material term hereof, FRANCHISEE shall be discharged of its obligation to pay any balance of the Franchise Fee remaining due hereunder and, further, FRANCHISOR shall refund to FRANCHISEE the entire portion of the Franchise Fee theretofore paid by FRANCHISEE prior to the date of the latter's notice of termination, less (a) necessary administrative expenses incurred by FRANCHISOR in connection with such termination, and (b) any amounts due FRANCHISOR from FRANCHISEE for materials purchased and consumed, plus interest thereon at the rate of ten percent (10%) per annum commencing on the date each payment of money toward the Franchise Fee was received by FRANCHISOR from FRANCHISEE. Such refund, plus interest, shall be due and payable within sixty (60) days following said date of notice.

ii) If FRANCHISEE's notice of termination is received by FRANCHISOR after the first anniversary date hereof, FRANCHISEE shall not be entitled to any refund of the Franchise Fee, nor relieved of any obligations or debts

hereunder by virtue of such termination, unless such debts and obligations are paid in full or unless and until a complete transfer of the Franchised Business granted hereunder has been effectuated and FRANCHISEE's obligations and debts hereunder have been assumed by a bona fide purchaser, pursuant to the provisions of Paragraph 13 immediately below.

b) Termination by Franchisor: In the event that FRANCHISEE shall at any time be in breach of any material term or condition contained herein or fails to meet and maintain the agreed upon minimum annual sales quotas set forth in Schedule "D" hereto, FRANCHISOR shall have the right to notify FRANCHISEE of such default and of FRANCHISOR's intention to terminate this Agreement unless such default is corrected by FRANCHISEE within thirty (30) days from the date of such written notice. If such default is not corrected by FRANCHISEE within thirty (30) days, FRANCHISOR shall be entitled, without prejudice to any of its other rights under this Agreement, to terminate this Agreement at any time thereafter by sending a written notice of termination to FRANCHISEE to take effect immediately or upon any date of termination set forth in such notice. Waiver by FRANCHISOR of any specific default or breach by FRANCHISEE shall not be deemed to be a waiver of any other or subsequent default or breach. In addition, in the event FRANCHISEE becomes insolvent, exercises an assignment for the benefit of creditors,

goes into litigation or has a receiver or trustee appointed for the benefit of creditors, whether voluntary or otherwise, commits a fraud or embezzlement against FRANCHISOR, has its license(s) revoked, neglects the customer account and emergency service requirements hereof to the extent that in the good faith business judgment of FRANCHISOR a Customer is exposed (or is in imminent danger of being exposed) to a serious life safety problem, FRANCHISOR shall be entitled to terminate this Agreement by sending written notice to FRANCHISEE, such termination to be effective immediately as of the date of dispatch of such notice by FRANCHISOR.

12. TERMINATION RIGHTS:

a) Upon the effective date of termination of this Agreement, FRANCHISEE shall immediately cease any and all use of the MARKS. FRANCHISEE shall, within three (3) days of termination, return to FRANCHISOR any and all documents, materials and equipment belonging to FRANCHISOR and then in the possession, custody and/or control of FRANCHISEE including, but not limited to, any and all service and/or installation instructions, procedures, specifications or manuals, rate schedule guidelines, customer lists, invoices and billing statements, financial records, inventory lists and the like, unless otherwise agreed to in writing by FRANCHISOR.

b) Within thirty (30) days prior to the effective date of termination, if such termination occurs as a result of an election by FRANCHISEE to so terminate, or within ten (10)

days subsequent to termination if such termination is for cause by FRANCHISOR, FRANCHISEE shall turn over to FRANCHISOR the following:

i) A complete list of all Customers in the Territory which it serviced, together with their respective service requirements still to be satisfied; and

ii) A complete inventory of all equipment and supplies in FRANCHISEE's possession and the amount and condition thereof.

c) FRANCHISOR shall have the right and option to purchase back FRANCHISEE's inventory or any part thereof remaining upon termination, at cost less fifteen percent (15%) for depreciation, provided that said inventory has not been previously purchased or otherwise validly acquired by an authorized assignee or transferee pursuant to Paragraph 13 hereinbelow.

d) Following the termination of this Agreement under any of the foregoing circumstances, it is understood and agreed that FRANCHISOR shall have the right to grant to a subsequent Franchisee the same or substantially the same rights and Franchise in the Territory as are granted to FRANCHISEE hereby, subject only to the provisions set forth in Paragraphs 12(e) and (f) immediately below regarding the application of the Franchise Fee from such a subsequent Franchisee to the reduction of any balance of FRANCHISEE's Franchise Fee still due and payable on the effective day hereof.

e) Notwithstanding the termination of the grants and licenses herein to FRANCHISEE, FRANCHISOR shall remain liable to FRANCHISOR for the balance due, if any, of (i) the "Franchise Fee"; (ii) service charges for Special Services provided; and (iii) the cost to MPE of reservicing Customer service accounts improperly serviced by FRANCHISEE prior to the termination hereof. Notwithstanding the foregoing, however, it is agreed that the amount of said balance shall be reduced correspondingly by the amount, if any, of (i) accounts receivable owed by MPE to the FRANCHISEE or (ii) a Franchise Fee paid to FRANCHISOR by a subsequent Franchisee for the Territory, or any other Franchised Territory which substantially encompasses the Territory. In this connection, FRANCHISOR agrees to make a good faith effort to obtain from any such subsequent Franchisee for the Territory a Franchise Fee in an amount at least equal to the balance of the Franchise Fee still due and payable by FRANCHISEE.

f) If, subsequent to the termination hereof, FRANCHISOR is unable to sell a Franchise for the Territory or for a territory which substantially encompasses the Territory, FRANCHISOR shall have the right, in its sole business discretion, to divide the Territory so that portions thereof become part of such newly defined Franchised Territories. In the latter event, the portions of any Franchise Fees obtained from Franchisees of such newly defined Territories

reasonably attributable to the portions of the Territory included therein shall be applied to reduce FRANCHISEE's remaining balance of its Franchise Fee hereunder, as provided in Paragraph 12(e) immediately above.

g) Regardless of the manner of termination, or whether by FRANCHISOR or FRANCHISEE, FRANCHISOR shall have the right, for a ninety (90) day period commencing immediately upon the effective date of termination, to have access to FRANCHISEE's place of business and to inspect the books and records thereof for the purpose of ascertaining the disposition by FRANCHISEE of its accounts receivable. Moreover, during said ninety (90) day period, FRANCHISOR shall have the right to perform quality control inspections of the facilities of Customers previously serviced by FRANCHISEE to determine whether due to FRANCHISEE's neglect or otherwise, any such Customers are in jeopardy. In the event that during said ninety (90) day period FRANCHISOR determines, at its sole discretion, that certain of the Customers in FRANCHISEE's Territory are in jeopardy or require reservicing in order to meet applicable State Fire Marshal regulations, FRANCHISOR shall have the right to reservice such Customers unilaterally, at the sole expense of FRANCHISEE.

13. ASSIGNMENT OR OTHER TRANSFER:

a) FRANCHISEE shall neither sell, assign, transfer nor encumber this Agreement nor any right or interest therein or thereunder, nor suffer or permit any such assignment,

transfer or encumbrance to occur by operation of law without the prior written consent of FRANCHISOR. The assignment, transfer or encumbrance of any right or interest herein, other than as provided in this Agreement, shall be void, shall constitute a material breach of this Franchise Agreement and shall be grounds for FRANCHISOR to exercise its right to terminate this Agreement.

In the event FRANCHISEE is a corporation, a transfer in the aggregate of more than ten percent (10%) of its issued and outstanding capital stock or other ownership or management rights shall be deemed equivalent to an assignment of this Agreement. In the event FRANCHISEE is a partnership, a transfer of an interest in the partnership or other ownership or management rights shall be deemed equivalent to an assignment of this Agreement. Transfers between parties having executed this Agreement, or members of their immediate families, shall not be deemed to be in violation of this Agreement.

b) FRANCHISEE represents that it is not acquiring this Agreement for speculation and that it has no present intent or understanding with or commitment to any third party to sell or assign the Business franchised hereunder.

c) In the event of the death or disability of FRANCHISEE, if a sole proprietor, or the death or disability of a principal of FRANCHISEE, if a corporation or partnership, FRANCHISOR shall consent to the transfer of this Agreement to

FRANCHISEE's (or the deceased principal's or partner's) spouse, heirs or relatives, by blood or by marriage, whether such a transfer is made by Will or by operation of law if, at the sole discretion and judgment of FRANCHISOR, such person or persons obtaining said interest shall be capable of conducting said Business in the place and stead of the deceased person in a manner satisfactory to FRANCHISOR and, subject to FRANCHISOR's right of first refusal, set forth in Paragraph 13(d)(i) immediately below. As used herein, the disability of FRANCHISEE (or a principal of FRANCHISEE) shall be deemed to occur when the latter suffers from a physical and/or mental infirmity which renders him incapable of rendering the Services in the manner acquired hereunder or otherwise conducting the Franchised Business in the manner conducted prior to the onset of such infirmity.

d) FRANCHISEE, its heirs or personal representatives (hereinafter "Assignor") may sell and assign its rights under this Agreement to a bona fide purchaser as hereinafter set forth (hereinafter "Assignee"), provided that FRANCHISEE is not in default hereunder, and further provided that FRANCHISOR may impose reasonable conditions on any assignment or transfer permitted hereunder which may include, without limitation, the following:

i) FRANCHISEE agrees to give FRANCHISOR notice of his intention to sell the Franchise or to list it with a broker prior to placing any advertisement, executing a

listing agreement or otherwise offering the Franchise for sale. FRANCHISOR shall have the right of first refusal on any sale to a bona fide purchaser, and no third-party offer to purchase or acceptance of FRANCHISEE's offer to sell may be concluded without a prior offer to FRANCHISOR. The proposed offer shall be in writing and shall set forth the exact terms and conditions of the proposed sale. FRANCHISOR shall have fifteen (15) days within which to accept the offer in writing. Failure of FRANCHISOR to accept such offer within fifteen (15) days shall constitute a rejection thereof. If rejected, FRANCHISEE shall have six (6) months within which to sell the Franchise upon the same terms and conditions as contained in the offer to FRANCHISOR. FRANCHISEE shall not sell the Franchise upon terms and conditions less favorable to it than those offered to FRANCHISOR, and any material changes in the terms of any offer prior to closing shall constitute a new offer subject to the same rights of first refusal by FRANCHISOR as in the case of an original offer to sell. Sales between the parties of this Agreement and members of their immediate families are excepted.

ii) FRANCHISEE must satisfy fully all obligations to FRANCHISOR or others arising out of the operation of the Franchised Business or Assignee must agree to assume and discharge all obligations to FRANCHISOR or

others arising out of the operation of the Franchised Business. In the event that any balance of the Franchise Fee is still owed by FRANCHISEE to FRANCHISOR, the obligation to pay such balance shall be assumed by and transferred to Assignee, provided that Assignee satisfies all of the requirements imposed upon it by this Agreement; upon the assumption by and transfer to Assignee of said balance, FRANCHISEE shall be fully released from such obligation. In this connection, Assignee must agree in writing to pay directly to FRANCHISOR the following percentage of any and all payments which it must pay to FRANCHISEE, pursuant to the terms of their agreement transferring the Franchised Business (which payments shall include, without limitation, down payment, installments, any other form of payment of the Franchise purchase price and any interest thereon):

$$\frac{\text{Balance of Franchise Fee Owed to FRANCHISOR}}{\text{Purchase Price of Franchised Business to Assignee}} \times 100\% = \text{\% payable to FRANCHISOR (the remainder being payable to FRANCHISEE)}$$

Example

Suppose the balance of the original Franchise Fee still due FRANCHISOR as of the date of a transfer of the Franchise to Assignee is $80,000. Suppose further that the purchase price of the Franchise

to Assignee is $120,000. The percentage referred to above would be:

$$\frac{80,000}{120,000} \times 100\% = 67\% \text{ to FRANCHISOR}$$
(33% to FRANCHISEE)

Thus, 67% of all purchase money payments which Assignee would otherwise pay to FRANCHISEE shall be paid directly to FRANCHISOR until the balance of the original Franchise Fee owed to FRANCHISOR by FRANCHISEE (which obligation is transferred to Assignee) is paid in full. The remaining 33% of such purchase money payments would be payable to FRANCHISEE.

iii) Assignee shall have sufficient equity capital in the Business to result in a debt-to-equity ratio of one to one, or such other debt-to-equity ratio as may be approved by FRANCHISOR.

iv) Assignee must agree to meet with FRANCHISOR's staff personnel and agree to take FRANCHISOR's personnel tests to determine Assignee's aptitude and ability to own and operate the Franchised Business in the place and stead of FRANCHISEE.

v) Assignee must agree to avail itself of the training required by FRANCHISOR of new Franchisees.

vi) Assignee prior to effectiveness of the assignment, shall pay to FRANCHISOR the sum of $500.00 as an "Assignment Fee" to cover FRANCHISOR's expenses and

services incurred in connection with such assignment. If FRANCHISEE is a sole proprietor or a partnership, and if subsequent to the execution hereof, FRANCHISEE decides to conduct business in a corporate capacity, FRANCHISOR will consent to the assignment of this Agreement to a corporation approved by FRANCHISOR, provided FRANCHISEE complies with the provisions hereinafter specified and any other condition that FRANCHISOR may require, including a limitation on the number of stockholders of the assignee corporation. Such assignee corporation shall be closely held and shall not engage in any business activities other than those directly related to the operation of the Franchised Business pursuant to the terms and conditions of this Agreement with FRANCHISOR. There shall be no Assignment Fee imposed by FRANCHISOR if the foregoing assignment to such corporation is made within ninety (90) days after the execution of this Agreement.

If the rights of FRANCHISEE are assigned to a corporation, as aforesaid, the FRANCHISEE shall be the legal and beneficial owner of no less than seventy-five percent (75%) of the stock of the assignee corporation and shall act as such corporation's principal officer. Notwithstanding the foregoing, however, and provided that FRANCHISEE retains controlling interest of the assignee corporation, FRANCHISEE may sell, transfer or

assign stock in such assignee corporation to members of FRANCHISEE's immediate family, or to a trustee in trust for same, to its operating managers, or to other Franchisee(s) of FRANCHISOR if such other Franchisee(s) to whom such stock interest is assigned is not then in default of any of the terms of said other Franchisee's agreement with FRANCHISOR. The sale, transfer or assignment of any stock interest of such assignee corporation, other than as herein provided, without the written consent of FRANCHISOR, shall constitute a material breach of this Agreement permitting FRANCHISOR, at its sole option, to terminate same forthwith. The Articles of Incorporation and the By-Laws of the assignee corporation shall reflect that the issuance and transfer of shares of stock are restricted in accordance with the foregoing provisions, and all stock certificates shall bear the following legend, which shall be printed legibly and conspicuously on the face of each stock certificate:

> "The transfer of this stock is subject to the terms and conditions of a franchise agreement with MASTER PROTECTION ENTERPRISES, dated 4/11/58. Reference is made to said franchise agreement and to restrictive provisions of the charter and by-laws of this corporation."

FRANCHISEE acknowledges that the purpose of the aforesaid restriction is to protect FRANCHISOR's MARKS, its "Confidential Information" (defined below), trade

secrets and operating procedures, as well as FRANCHISOR's general high reputation and goodwill, and is for the mutual benefit of FRANCHISOR, FRANCHISEE and other Franchisees.

The foregoing provisions of this Paragraph 13(d)(v) shall likewise apply if FRANCHISEE was a corporation when this Agreement was entered into, and to any corporate assignee to whom this Agreement may be assigned pursuant to the provisions of Paragraph 13(c)(v) immediately above.

e) If the FRANCHISEE makes any public offering of its capital stock pursuant to the Securities Act of 1933 or the Securities Exchange Act of 1934, as amended, or under any applicable state securities act, or any federal or state statute, rule, regulation or code pertaining to the offer, sale or issuance of securities to the public, or is acquired by or merged with a company whose shares of stock are publicly held or traded, this Agreement shall automatically terminate on the date of such acquisition, merger or offering without notice to FRANCHISEE.

14. CONFIDENTIAL INFORMATION; COMPETITION:

a) With respect to any and all Confidential Information disclosed by FRANCHISOR pursuant to this Agreement, FRANCHISEE hereby covenants and agrees as follows:

i) "Confidential Information" shall mean any and all know-how, specialized technical information and trade

secrets relating to equipment, processes or techniques compiled, designed, developed and/or produced by or on behalf of FRANCHISOR, whether or not subject to copyright or patent protection, including, but not limited to inventions, ideas, methods, designs, graphics, schematics or configurations of any kind, discoveries conceived, developed, made or produced by or on behalf of FRANCHISOR, data and information encompassed in drawings, designs, plans, proposals, specifications, processes, formulae, patterns, devices or other compilations of information, whether contained in documents or stored and/or processed by computers, such as, by way of example, but not limited to, supplier lists, customer (i.e. account) lists, special equipment requirements of customers, customer contacts, special customer training, confidential (unpublished) price lists, the due dates when customer service is due by law, installment and service manuals, specifications, fire extinguishing equipment (including placement and brand) instructions and the like.

ii) In order to prevent the unauthorized use of disclosure of the Confidential Information, and in order to maintain the advantages accruing from the continued secrecy thereof and to prevent others from acquiring knowledge of said Information, FRANCHISEE agrees that neither FRANCHISEE nor its officers, directors,

employees, agents, or representatives shall, during the term hereof, or at any time thereafter, reveal, divulge or make known to any individual, partnership, association, company or corporation any of the Confidential Information which was either known, or should have been known, to have been secret or confidential in nature, the revelation of which would or may cause business or personal injury or embarrassment to FRANCHISOR or any of its affiliates, employees or shareholders. FRANCHISEE represents to FRANCHISOR, as a material inducement to the execution of this Agreement, that it has no knowledge or know-how respecting the Confidential Information.

iii) FRANCHISEE agrees that it will not, directly or indirectly, divulge, disclose or communicate information concerning matters affecting or relating to the Business of FRANCHISOR to any individual, partnership, association, company or corporation at any time, whether or not for profit. Without limiting the generality of the foregoing, FRANCHISEE agrees not to disclose the names of any suppliers, their manner of operation, plans, processes, or any other information about or concerning the Business of FRANCHISOR. Without regard to whether any of the matters would otherwise be deemed confidential, material or important, the parties hereby stipulate that as between

them, the above are confidential, material and important and gravely affect the effective and successful conduct of the Business of FRANCHISOR and its goodwill, and that ANY breach of the terms of this Section by FRANCHISEE or its officers, directors or employees will be deemed a material breach of this Agreement, and that in addition to any other remedy for breach which FRANCHISOR may have under this Agreement or under law, including the right to immediate injunctive relief, it shall also have the immediate right to terminate this Agreement in accordance with the provisions hereof; provided, however, that no breach by any non-officer employee of FRANCHISEE shall be deemed a material breach of this Agreement if such employee is promptly terminated from such employment upon discovery of any such unauthorized disclosure.

iv) FRANCHISEE agrees that it shall take such action as may be required of it in order to assure the safekeeping of the Confidential Information which shall at minimum include, but not be limited to, all of the following:

(a) FRANCHISEE shall not make or permit any other person to make any copies of any documents containing Confidential Information, nor divulge any of the Confidential Information to FRANCHISEE's employees (except as provided hereinbelow) or

agents and shall keep all documents containing the Confidential Information in a safe and secure place.

(b) FRANCHISEE may divulge Confidential Information to FRANCHISEE's employees, provided that said Information disclosed to any single employee shall be limited to that which is reasonably necessary for such employee to properly perform his duties. FRANCHISEE shall require each such employee as a condition of commencement and continuation of employment, to sign a "Non-Disclosure Agreement" or similar agreement containing terms substantially similar to, or with the same practical and legal effect as, those terms contained herein for the benefit of the parties, and shall give FRANCHISOR a signed copy thereof upon written request. FRANCHISEE shall immediately notify FRANCHISOR of any employee who has made any unauthorized disclosure of any of the Confidential Information in his possession and shall discharge such employee forthwith, unless such discharge is waived by FRANCHISOR.

(c) The Confidential Information, constituting valuable trade secrets, shall be disseminated by FRANCHISOR to FRANCHISEE for the sole purpose of maintaining and operating the Franchise Business

and for no other reason. FRANCHISEE shall not, during the term of this Agreement or thereafter, use any of the Confidential Information for its own benefit other than in the operation of the Franchise or for the benefit of any third party.

(d) The foregoing provisions shall be binding upon FRANCHISEE forever, including the time after termination hereof or after the transfer of the Franchise granted hereby, unless and until any portion of the Confidential Information is, or becomes, other than by an act or omission by FRANCHISEE, generally available to the trade or shall by lawful means be made available to FRANCHISEE by a third party.

b) FRANCHISEE acknowledges that, were it to engage in the same or substantially the same business as the Franchised Business independently from this Agreement, it would be extremely difficult not to make use of some or all of the Confidential Information (disclosed and entrusted to FRANCHISEE for use in the conduct, operation and promotion of the Franchised Business in the Territory), because such Confidential Information is so integral to the operation of the Business. Accordingly, FRANCHISEE agrees that during the term of this Agreement, it will refrain from engaging in the same or substantially the same business as the Franchised Business within or without the Territory. After the termination of

this Agreement, FRANCHISOR will rely solely on the protective provisions of Paragraph 14(a) to protect and safeguard the confidentiality of and its proprietary interest in the Confidential Information.

c) In the event that, after the expiration or termination of this Agreement, FRANCHISEE makes use of FRANCHISOR's confidential customer list, the identity of customer contacts, special customer equipment requirements, special customer training, or any other confidential customer-related information (all of which constitutes part of FRANCHISOR's Confidential Information entrusted to FRANCHISEE hereunder), for the purpose of soliciting and diverting the Business of FRANCHISOR's Customers, or any of them, away from FRANCHISOR and to FRANCHISEE or any other party acting with or in concert with it, the parties agree that it would be extremely difficult to ascertain the magnitude of monetary damages which FRANCHISOR would suffer as a result of such unlawful solicitation. Accordingly, the parties agree that with respect to each such Customer so solicited, a figure of one hundred percent (100%) of the amount of the gross sales of products and services invoiced to such Customer during the twelve (12) month period immediately preceding the month in which such unlawful solicitation occurs would provide reasonable compensation to FRANCHISOR for the legal harm done and monetary damages caused by such solicitation. It is understood and agreed that the foregoing agreement as to

reasonable liquidated damages in the event of such unlawful conduct by FRANCHISEE shall be without prejudice to FRANCHISOR's right to injunctive relief to abate such unlawful conduct, or any other relief at law or in equity to which FRANCHISOR may be entitled.

15. NOTICES:

Any notices provided for hereunder shall be given by hand delivery or first class certified mail, return receipt requested, postage prepaid, to the parties at their respective addresses first set forth above or to such other address as either party may from time to time designate.

16. RELATIONSHIP OF THE PARTIES:

This Agreement shall not be construed as creating an agency, joint venture or partnership relationship between the parties, or as creating any other form of legal association which would impose liability upon one party for the act or failure to act of the other party. Moreover, all costs, expenses and taxes, if any, incurred by FRANCHISEE in connection with its use of the MARKS and operation of the Franchised Business hereunder shall be its sole responsibility, unless otherwise expressly provided in this Agreement.

17. COMPLETE UNDERSTANDING; MODIFICATION:

This Agreement constitutes the full and complete understanding and agreement of the parties hereto with respect to the subject matter hereof, and supersedes all prior negotiations, understandings and agreements. Any waiver, modification or

amendment of any provision of this Agreement shall be effective only if in writing and signed by the parties hereto. The paragraphs and provisions of this Agreement shall be deemed independent and separable. If any paragraph, provision or portion of this Agreement is deemed invalid by virtue of litigation or legislation, the remainder shall not thereby be invalidated but shall remain in full force and effect.

18. INCORPORATION BY REFERENCE:

All Schedules referred to herein and attached hereto are by such reference incorporated into this Agreement as though fully set forth herein.

19. GOVERNING LAW:

This Agreement shall be governed by and construed in accordance with the laws of the State of California.

20. HEADINGS:

The headings of the Paragraphs of this Agreement are for convenience and reference only and are not intended in any way to modify, enlarge or limit the provisions hereof; nor shall such headings be used to interpret or construe the intent of the parties with respect to the provisions of this Agreement.

21. REPRESENTATION:

Each of the signatories to this Agreement represents that he or she is duly authorized to bind his or her respective party to the terms, provisions and conditions of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date and year first above written.

MASTER PROTECTION ENTERPRISES
"FRANCHISOR"

By: Ronald W. Bogardus
Jerrold S. Pressman
President
Vice President

Witness Robin D Phillips

Print Name Robin D Phillips

Print Title District Manager

"FRANCHISEE"

By: Bard M. Holbrook

Print Name BARD M. HOLBROOK

Print Title OWNER

Witness Ronald W. Bogardus

Print Name Ronald W. Bogardus

Print Title Vice President

SCHEDULE "A"

MPE TRADEMARKS AND SERVICE MARKS LICENSED UNDER FRANCHISE AGREEMENT BETWEEN MASTER PROTECTION ENTERPRISES, INC. AND _____ Brad Holbrook AND _____ AND _____.

DATED: April 11, 1985.

1. Trademarks:

   a) MASTER PROTECTION ENTERPRISES and Parallel Design, U.S. Registration No. 1,172,027, registered October 6, 1981 on the Principal Register;

   b) MPE (no registration).

2. Service Marks:

   a) U.S. Registration No. 1,188,089, registered January 26, 1982 on the Principal Register;

   b) MPE (no registration).

3. Trade Names:

   a) MASTER PROTECTION ENTERPRISES.

   b) MPE.

4. Logotypes/Commercial Symbols:

   MASTER PROTECTION ENTERPRISES and Parallel Design.

SCHEDULE "B"

SERVICES TO BE RENDERED BY FRANCHISEE PURSUANT TO FRANCHISE AGREEMENT BETWEEN MASTER PROTECTION ENTERPRISES, INC. AND _____ Brad Holbrook AND _____ AND _____.

DATED: April 11, 1985.

SERVICES TO BE RENDERED

Restaurant System Service.

SCHEDULE "C"

FRANCHISE TERRITORY PURSUANT TO FRANCHISE AGREEMENT BETWEEN MASTER PROTECTION ENTERPRISES, INC. AND Brad Hillbrook AND _____ AND _____.

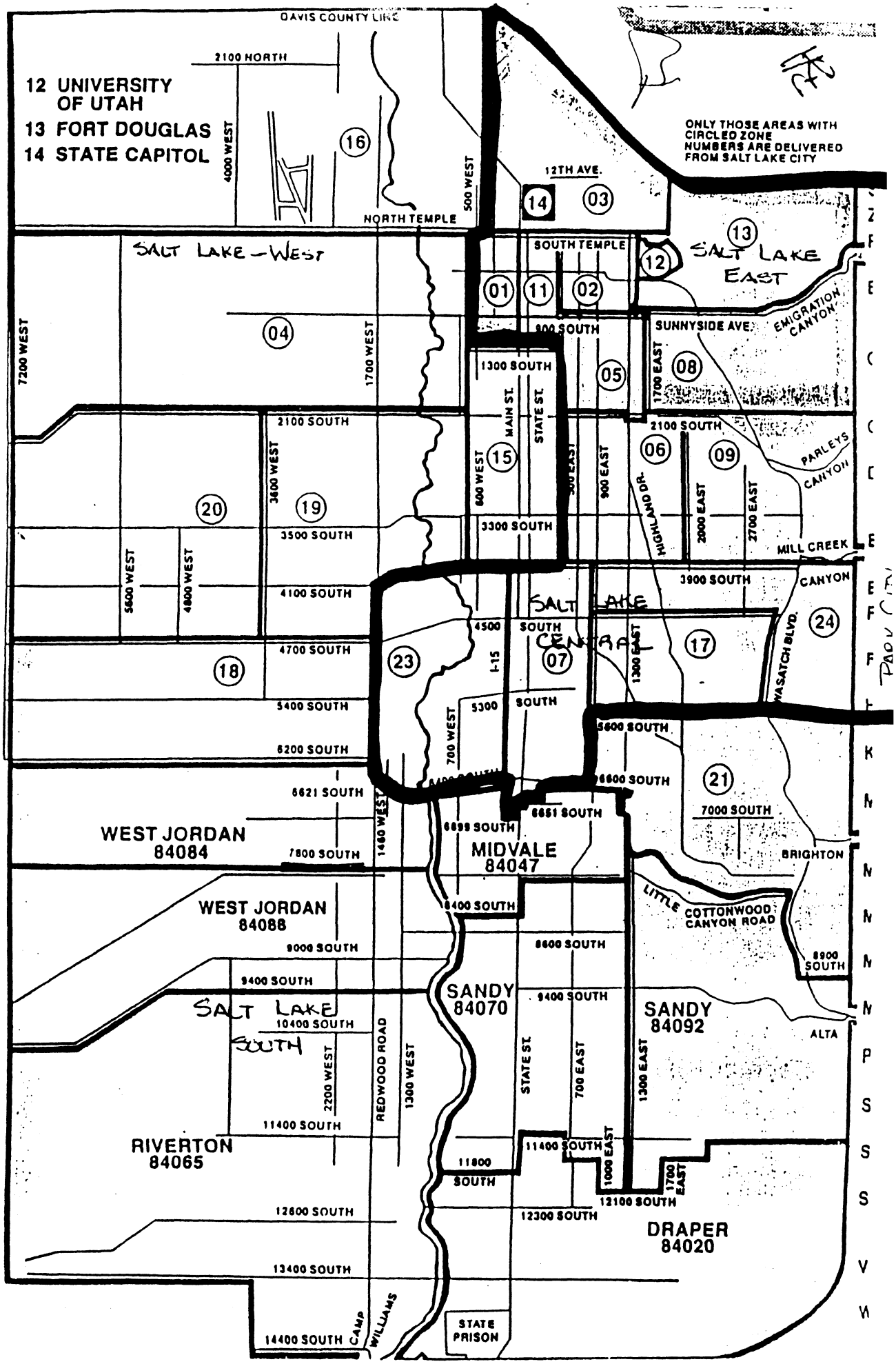
DATED: April 11, 1985.

FRANCHISE TERRITORY:

Salt Lake City - East/Central Section with the Following Zip Codes. 84123 - 84107 - 84117 - 84124 84105 - 84113 - 84106 - 84109 - 84060 - 84103 84108 - 84102 - 84114 - 84101 - 84110 - 84111

As per Attached Map.

15


12 UNIVERSITY OF UTAH
13 FORT DOUGLAS
14 STATE CAPITOL
ONLY THOSE AREAS WITH CIRCLED ZONE NUMBERS ARE DELIVERED FROM SALT LAKE CITY
DAVIS COUNTY LINE
2100 NORTH
4000 WEST
500 WEST
NORTH TEMPLE
12TH AVE.
SOUTH TEMPLE
SALT LAKE - WEST
SALT LAKE EAST
SUNNYSIDE AVE.
EMIGRATION CANYON
7200 WEST
1700 WEST
900 SOUTH
1300 SOUTH
1700 EAST
MAIN ST.
STATE ST.
2100 SOUTH
3600 WEST
600 WEST
300 EAST
900 EAST
HIGHLAND DR.
2000 EAST
2700 EAST
PARLEYS CANYON
3300 SOUTH
MILL CREEK CANYON
3500 SOUTH
3900 SOUTH
5600 WEST
4800 WEST
4100 SOUTH
SALT LAKE CENTRAL
4500 SOUTH
I-15
1300 EAST
WASATCH BLVD.
4700 SOUTH
5300 SOUTH
700 WEST
5400 SOUTH
5600 SOUTH
6200 SOUTH
6600 SOUTH
6621 SOUTH
1460 WEST
6651 SOUTH
6699 SOUTH
7000 SOUTH
WEST JORDAN 84084
7800 SOUTH
MIDVALE 84047
BRIGHTON
WEST JORDAN 84088
8400 SOUTH
LITTLE COTTONWOOD CANYON ROAD
8600 SOUTH
8900 SOUTH
9000 SOUTH
9400 SOUTH
SANDY 84070
SANDY 84092
ALTA
SALT LAKE SOUTH
10400 SOUTH
2200 WEST
REDWOOD ROAD
1300 WEST
STATE ST.
700 EAST
1300 EAST
11400 SOUTH
RIVERTON 84065
11800 SOUTH
1000 EAST
1700 EAST
12100 SOUTH
12300 SOUTH
12600 SOUTH
DRAPER 84020
13400 SOUTH
14400 SOUTH
CAMP WILLIAMS
STATE PRISON

SCHEDULE "D"

MINIMUM ANNUAL SALES QUOTAS PURSUANT TO FRANCHISE AGREEMENT BETWEEN MASTER PROTECTION ENTERPRISES, INC. AND Brad Holbrook AND _____ AND _____.

DATED: April 11, 1988.

Last Year's Annual Sales	$ 70,000.00
Purchase Price	$ 70,000.00
Projected Gross Sales for 1986:	$ 77,000.00

FRANCHISEE'S plans to reach this projection:

Solicitation, & Use of No-Fault Insurance Program.

SCHEDULE "E"

PROMISSORY NOTE PURSUANT TO FRANCHISE AGREEMENT BETWEEN MASTER PROTECTION ENTERPRISES, INC. AND Brad Holbrook AND _____ AND _____.

Place: Salt Lake City $ 70,000.00

Date: April 11, 1988.

FOR GOOD AND VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned, Brad Holbrook, an individual/partnership/corporation, and -0- and -0- as individuals, collectively, and for the corporation ("FRANCHISEE") pursuant to the above-referenced Franchise Agreement do(es) hereby promise to pay to Master Protection Enterprises, Inc. ("MPE"), or order, at such place designated by MPE, the sum of Seventy-Thousand DOLLARS ($ 70,000.00) payable in United States currency with Five-Thousand DOLLARS ($ 5,000.00) down (see note) and the balance of $ 65,000.00 DOLLARS in equal monthly installments of Four-Hundred-Eleven 22/100 DOLLARS ($ 411.22) per month, interest free, commencing on the first (1st) day of July, 1988 and continuing monthly on the first (1st) day of each succeeding month until paid in full for a period of ten (10) years. The remainder shall be due on the first day of the next month.

Should the undersigned FRANCHISEE terminate said Franchise Agreement pursuant to Paragraph 11(a) thereof, FRANCHISEE's obligation under this Note shall be fully discharged. Otherwise, should the undersigned FRANCHISEE default in any payment to be made hereunder when due, the whole sum of principal shall become immediately due at the option of the holder of this Note. If any action be instituted on this Note, the undersigned promises to pay such sum as the Court may fix as attorney's fees.

12

(Signatures on next page)

ATTACHMENT B

EXHIBIT F C90-445

SCHEDULE "E"

PROMISSORY NOTE PURSUANT TO FRANCHISE AGREEMENT BETWEEN MASTER PROTECTION ENTERPRISES, INC. AND Brad Holbrook AND _____ AND _____.

Place: Salt Lake City $ 70,000.00

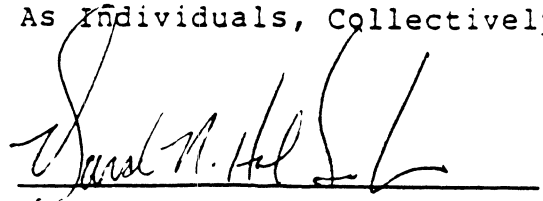
Date: April 11, 1988.

FOR GOOD AND VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned, Brad Holbrook, an individual/partnership/corporation, and -0- and -0- as individuals, collectively, and for the corporation ("FRANCHISEE") pursuant to the above-referenced Franchise Agreement do(es) hereby promise to pay to Master Protection Enterprises, Inc. ("MPE"), or order, at such place designated by MPE, the sum of Seventy-Thousand DOLLARS ($ 70,000.00) payable in United States currency with Five-Thousand DOLLARS ($ 5,000.00) down (see note) and the balance of $ 65,000.00 DOLLARS in equal monthly installments of Four-Hundred-Eleven 22/100 DOLLARS ($ 411.22) per month, interest free, commencing on the first (1st) day of July, 1988 and continuing monthly on the first (1st) day of each succeeding month until paid in full for a period of ten (10) years. The remainder shall be due on the first day of the next month.

Should the undersigned FRANCHISEE terminate said Franchise Agreement pursuant to Paragraph 11(a) thereof, FRANCHISEE's obligation under this Note shall be fully discharged. Otherwise, should the undersigned FRANCHISEE default in any payment to be made hereunder when due, the whole sum of principal shall become immediately due at the option of the holder of this Note. If any action be instituted on this Note, the undersigned promises to pay such sum as the Court may fix as attorney's fees.

12

(Signatures on next page)

_____	As Individuals, Collectively
(Corporation/Company)	
_____	
(Signature)	(Signature)
_____	BARD N. HOLBROOK
(Print Name)	(Print Name)
_____	
(Print Title)	
_____	_____
(Signature)	(Signature)
_____	_____
(Print Name)	(Print Name)
_____	
(Print Title)	

Date: _____

CORPORATE SEAL

PROMISSORY NOTE

I, Bard Hallcock, FOR VALUE RECEIVED, on April 11,
(Please Print)
1988, promise to pay to MASTER PROTECTION Enterprises,
the sum of Five Thousand and 00/100 Dollars ($5,000.00).

I further understand and agree that repayment of this Note will commence with the disbursement period nearest to 90 days from this Note.

I further understand and agree that there is a 3% Service Charge (minimum $20.00) and that this Note will bear interest at the rate of 12%, and is payable in One Hundred Twenty-Six (126) semi-monthly installments of $55.61 each, to reflect principal, interest and service charge.

In the event of my termination of my affiliation with Master Protection Enterprises, the full remaining balance of this Note will be immediately due and payable.

I authorize the Company to deduct whatever sums of money might be owed under the Promissory Note at time of termination, from any sums owed to my account.

In the event of commencement of suit to enforce payment of this Note, the prevailing party agrees to pay such additional court costs and attorney fees as the court may adjudge reasonable.

Signed by: Bard N. Hallcock

Dated: 4/11/88

Witnessed by: Ronald W. Zgraggen No: _____ Due: _____

PROMISSORY NOTE

I, Band Hillcock, FOR VALUE RECEIVED, on April 11,
(Please Print)
1988, promise to pay to MASTER PROTECTION Enterprises,
the sum of Five Thousand and 00/100 Dollars ($5,000.00).

I further understand and agree that repayment of this Note will commence with the disbursement period nearest to 90 days from this Note.

I further understand and agree that there is a 3% Service Charge (minimum $20.00) and that this Note will bear interest at the rate of 12%, and is payable in One Hundred Twenty-Six (126) semi-monthly installments of $55.61 each, to reflect principal, interest and service charge.

In the event of my termination of my affiliation with Master Protection Enterprises, the full remaining balance of this Note will be immediately due and payable.

I authorize the Company to deduct whatever sums of money might be owed under the Promissory Note at time of termination, from any sums owed to my account.

In the event of commencement of suit to enforce payment of this Note, the prevailing party agrees to pay such additional court costs and attorney fees as the court may adjudge reasonable.

Signed by: Band N. Hillcock

Dated: 4/11/88

Witnessed by: [signature] No:_____ Due:_____

SCHEDULE "E"

PROMISSORY NOTE PURSUANT TO FRANCHISE AGREEMENT BETWEEN MASTER PROTECTION ENTERPRISES, INC. AND Brad Hilbrook AND _____ AND _____.

Place: Salt Lake City $ 40,000.00

Date: April 11, 1988.

FOR GOOD AND VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned, Brad Hilbrook, an individual/partnership/corporation, and ~~(illegible)~~ and ~~(illegible)~~ as individuals, collectively, and for the corporation ("FRANCHISEE") pursuant to the above-referenced Franchise Agreement do(es) hereby promise to pay to Master Protection Enterprises, Inc. ("MPE"), or order, at such place designated by MPE, the sum of Forty-Thousand DOLLARS ($40,000.00) payable in United States currency with Five-Thousand DOLLARS ($ 5,000.00) down → see note and the balance of $ 35,000.00 DOLLARS in equal monthly installments of Two-Hundred-Eleven 22/100 DOLLARS ($211.22) per month, interest free, commencing on the first (1st) day of July, 1988, and continuing monthly on the first (1st) day of each succeeding month until paid in full for a period of ten (10) years. The remainder shall be due on the first day of the next month.

Should the undersigned FRANCHISEE terminate said Franchise Agreement pursuant to Paragraph 11(a) thereof, FRANCHISEE's obligation under this Note shall be fully discharged. Otherwise, should the undersigned FRANCHISEE default in any payment to be made hereunder when due, the whole sum of principal shall become immediately due at the option of the holder of this Note. If any action be instituted on this Note, the undersigned promises to pay such sum as the Court may fix as attorney's fees.

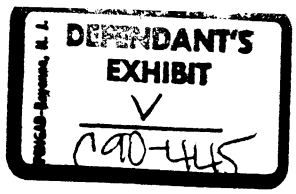
(Signatures on next page)

_____	As Individuals, Collectively
(Corporation/Company)	
_____	_____
(Signature)	(Signature)
_____	_____
(Print Name)	(Print Name)
_____	
(Print Title)	
_____	_____
(Signature)	(Signature)
_____	_____
(Print Name)	(Print Name)
_____	
(Print Title)	

Date: _____

CORPORATE SEAL

ATTACHMENT C



MASTER PROTECTION INDUSTRIES

TRADE SECRET AGREEMENT

Pursuant to your association or employment with MASTER PROTECTION INDUSTRIES, the Company requires as a condition of your association or employment, because of the Company's tremendous expense in developing certain customer accounts and procedures, which the Company classifies as "trade secrets," that you execute this document, signifying that you understand and agree that you will hold in strictest confidence all information that is learned by you through your association with the Company, such information including but not limited to the names, addresses, and service due-dates of customer accounts, Company concepts, programs, policies, and procedures utilized in developing and administering the Company's service business, and new procedures and programs that may be established from time-to-time in the ordinary course of business.

You further agree that you will not use for yourself or another, or divulge this information to a third party for profit or not, and in any capacity you may hold with respect to another individual or your own company.

Because of these conditions and the fact that the Company cannot ascertain what damages it might incur should you breach your covenant not to disclose such "trade secrets," you hereby understand and agree that the Company is entitled by virtue of this Agreement to seek and obtain a permanent injunction against such breach, and that you will accept responsibility for any losses that might be fairly adjudicated by a Court, including Court costs, attorney fees, and accounting and auditing costs related thereto.

In executing this Agreement, you affirm that you have read, understand, and agree to be bound by its contents.

Agreed to this 9 day of July, 1981, in the County of S.L.C., State of UTAH.

Signed: David M. Holbrook

BAZO HOLBROOK
(Please print name under line)

Witness: _____
(Authorized person only)

ATTACHMENT D

SPECIAL VERDICTS TO JURY

QUESTION NO. 1: Do you find that Plaintiff Bard Holbrook was forced to enter into the two Franchise Agreements under duress? Answer Yes or No.

Answer: NO

QUESTION NO. 2: Do you find that Defendant Firemaster's actions regarding the payment of commissions should bar Defendant Firemaster from being able to enforce the Non-Competition and liquidated damages provisions of the contracts between the parties?

Answer Yes or No.

Answer: YES

QUESTION NO. 3: Do you find that the consideration of the Plaintiff was to receive under the contracts between the parties failed, thereby terminating his obligations under such contracts? Answer Yes or No.

Answer: YES

QUESTION NO. 4: Do you find that Defendant Firemaster waived its rights to require Plaintiff Bard Holbrook to perform his obligations under the territory agreement and Franchise contracts as a result of Defendant Firemaster's failure to pay commissions and provide services as set forth in the contracts?

Answer Yes or No.

Answer: Yes

QUESTION NO. 5: Do you find that Defendant Firemaster's prior failure to perform their obligations under the contracts justified Plaintiff's refusal to continue to perform under such contracts?

Answer Yes or No.

Answer: Yes

ATTACHMENT E

SPECIAL VERDICT REGARDING FIREMASTER'S CLAIM AGAINST PLAINTIFF FOR BREACH OF THE CONFIDENTIALITY PROVISIONS OF THE WRITTEN AGREEMENTS

We, the jury in the above entitled action, find the following Special Verdict on the following questions submitted to us:

Question No. 1: Did plaintiff voluntarily sign the Territory Agreement dated June 30, 1987, the Trade Secret Agreement dated July 11, 1987 and the two Franchise Agreements dated April 11, 1988?

Answer: "Yes" or "No".

Answer: yes

If you answer Question No. 1 "no," sign and return this verdict. If you answer Question No. 1 "yes," then answer the next question.

Question No. 2: Do Firemaster's customer lists derive independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from disclosure or use of the customer lists?

Answer: "Yes" or "No".

Answer: yes

If you answer Question No. 2 "no" sign and return this verdict. If you answer Question No. 2 "yes," then answer Question No. 3.

Question No. 3: Did Firemaster take reasonable efforts under the circumstances to maintain the secrecy of its customer lists?

Answer: "Yes" or "No".

Answer: yes

If you answer Question No. 3 "no," sign and return this verdict. If you answer Question No. 3 "yes," then answer Question No. 4.

Question No. 4: Did plaintiff improperly use Firemaster's customer lists for the benefit of either himself or his new company, Fire Suppression Services, Inc.?

Answer: "Yes" or "No".

Answer: yes

If you answer Question No. 4 "no," sign and return this verdict. If you answer Question No. 4 "yes," then answer Question No. 5.

Question No. 5: Was Firemaster damaged as a direct and proximate result of plaintiff's improper use of Firemaster's customer lists?

Answer: "Yes" or "No".

Answer: yes

If you answer Question No. 5 "no," sign and return this verdict. If you answer Question No. 5 "yes" then answer the next question.

Question No. 6: What is the total amount of all damages suffered by Firemaster as a result of plaintiff's improper use of Firemaster's customer lists?

Answer: $ 10,000.00

DATED: 2-12-91.

FOREPERSON

382/021091C

ATTACHMENT F

SPECIAL VERDICT REGARDING PLAINTIFF'S CLAIM AGAINST FIREMASTER FOR BREACH OF THE TERRITORY AGREEMENT

We the jury in the above entitled action, find the following Special Verdict on the following questions submitted to us:

QUESTION NO. 1: Do you find that the territory agreement constituted a valid and enforceable agreement between the parties?

Answer Yes or No.

Answer: Yes

If you answer Question No. 1 "no," sign and return this verdict. If you answer Question No. 1 "yes," then answer the next question.

QUESTION NO. 2: Do you find that the Plaintiff Bard Holbrook fully performed his obligations under the territory agreements prior to its termination?

Answer Yes or No.

Answer: Yes

If you answer Question No. 2 "no," sign and return this verdict. If you answer Question No. 2 "yes," then answer the next question.

QUESTION NO. 3: Do you find that Plaintiff Bard Holbrook was lawfully excused from performing any further obligations under the territory agreement?

Answer Yes or No.

Answer: yes

If you answer Question No. 3 "no," sign and return this verdict. If you answer Question No. 3 "yes," then answer the next question.

QUESTION NO. 4 : Do you find that Defendant Firemaster wrongfully and without excuse or justification failed to pay Plaintiff Bard Holbrook the commissions and provide services set forth in Sections 4 and 8 of the territory agreement?

Answer Yes or No.

Answer: yes

If you answer Question No. 4 "no," sign and return this verdict. If you answer Question No. 4 "yes," then answer the next question.

QUESTION NO. 5: Did Defendant Firemaster's conduct cause Plaintiff Bard Holbrook to suffer damages which were reasonably foreseeable?

Answer Yes or No.

Answer: yes

If you answer Question No. 5 "no," sign and return this verdict. If you answer Question No. 5 "yes," then answer the next question.

QUESTION NO. 6: What is the total amount of all damage suffered by Plaintiff Bard Holbrook as a result of Firemaster's breaches of the Territory Agreement?

Answer: $ 5,889.35

DATED: 2-12-91

Foreperson

SPECIAL VERDICT REGARDING PLAINTIFF'S CLAIM AGAINST FIREMASTER FOR BREACH OF THE FRANCHISE AGREEMENT NO. 1 FOR THE SALT LAKE CITY AREA

We the jury in the above entitled action, find the following Special Verdict on the following questions submitted to us:

QUESTION NO. 1: Do you find that the Franchise Agreement No. 1 for the Salt Lake City Area constituted a valid and enforceable agreement between the parties?

Answer Yes or No.

Answer: yes

If you answer Question No. 1 "no," sign and return this verdict. If you answer Question No. 1 "yes," then answer the next question.

QUESTION NO. 2: Do you find that Plaintiff Bard Holbrook fully performed his obligations under the Franchise Agreement No. 1 for the Salt Lake City Area prior to his termination with Defendant Firemaster?

Answer Yes or No.

Answer: yes

If you answer Question No. 2 "no," sign and return this verdict. If you answer Question No. 2 "yes," then answer the next question.

QUESTION NO. 3: Do you find that Plaintiff Bard Holbrook was lawfully excused from performing any further obligations under the Franchise Agreement No. 1 for the Salt Lake City area? Answer Yes or No.

Answer: yes

If you answer Question No. 3 "no," sign and return this verdict. If you answer Question No. 3 "yes," then answer the next question.

QUESTION NO. 4: Do you find that Defendant Firemaster wrongfully and without excuse or justification failed to pay Plaintiff Bard Holbrook the commissions and provide services set forth in Section 4 and 8 of the Franchise Agreement No. 1 for the Salt Lake City Area?

Answer Yes or No.

Answer: yes

If you answer Question No. 4 "no," sign and return this verdict. If you answer Question No. 4 "yes," then answer the next question.

QUESTION NO. 5: Do you find that the Defendant Firemaster's wrongful, unjustified or unexcused conduct caused Plaintiff Bard Holbrook to suffer damages which were reasonably foreseeable? Answer Yes or No.

Answer: yes

If you answer Question No. 5 "no," sign and return this verdict. If you answer Question No. 5 "yes," then answer the next question.

QUESTION NO. 6: What is the total amount of all damage suffered by Plaintiff Bard Holbrook as a result of Firemaster's breach of Franchise Agreement No. 1 for the Salt Lake City Area?

Answer $ 1.00

DATED 2-12-91

Foreperson

SPECIAL VERDICT REGARDING PLAINTIFF'S CLAIM AGAINST FIREMASTER FOR BREACH OF THE FRANCHISE AGREEMENT NO. 2 FOR THE RURAL UTAH FRANCHISE

We the jury in the above entitled action, find the following Special Verdict on the following questions submitted to us:

QUESTION NO. 1: Do you find that the Franchise Agreement No. 2 for the Salt Lake City Area constituted a valid and enforceable agreement between the parties?

Answer Yes or No.

Answer: yes

If you answer Question No. 1 "no," sign and return this verdict. If you answer Question No. 1 "yes," then answer the next question.

QUESTION NO. 2: Do you find that Plaintiff Bard Holbrook fully performed his obligations under the Franchise Agreement No. 2 for the Salt Lake City Area?

Answer Yes or No.

Answer: yes

If you answer Question No. 2 "no," sign and return this verdict. If you answer Question No. 2 "yes," then answer the next question.

QUESTION NO. 3: Do you find that Plaintiff Bard Holbrook was lawfully excused from performing his obligations under the contracts?

Answer Yes or No.

Answer: yes

If you answer Question No. 3 "no," sign and return this verdict. If you answer Question No. 3 "yes," then answer the next question.

QUESTION NO. 4: Do you find that ~~Plaintiff Bard Holbrook~~ Defendant wrongfully and without excuse or justification failed to pay Plaintiff the commissions and provide services set forth in Section 4 and 8 of the Franchise Agreement No. 2 for the Salt Lake City Area?

Answer Yes or No.

Answer: yes

If you answer Question No. 4 "no," sign and return this verdict. If you answer Question No. 4 "yes," then answer the next question.

QUESTION NO. 5: Do you find that the Defendant Firemaster's wrongful, unjustified or unexcused conduct approximately caused Plaintiff Bard Holbrook to suffer damages which were reasonably foreseeable?

Answer Yes or No.

Answer: yes

If you answer Question No. 5 "no," sign and return this verdict. If you answer Question No. 5 "yes," then answer the next question.

QUESTION NO. 6: What is the total amount of all damage suffered by Plaintiff Bard Holbrook as a result of Firemaster's breach of Franchise Agreement No. 2 for the Rural Utah Franchise?

Answer $ 1.00

DATED 2-12-91

Foreperson